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THE

MISCELLANEOUS DOCUMENTS

OF THE

SENATE OF THE UNITED STATES

FOR THE

FIRST SESSION OF THE THIRTY-FIFTH CONGRESS.

IN FOUR VOLUMES.

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MISCELLANEOUS DOCUMENTS

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SENATE OF THE UNITED STATES

FOR THE

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5TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 1.

RESOLUTION

OF

THE LEGISLATURE OF CALIFORNIA,

IN BEHALF OF

General A. M. Winn.

DECEMBER 9, 1857.—Ordered to lie on the table and be printed.

CONCURRENT RESOLUTION for the relief of General A. M. Winn.

Resolved by the assembly, (the senate concurring,) That our senators be instructed, and our representatives in Congress requested, to use their best endeavors in bringing before Congress the claim of General A. M. Winn, for the sum of nineteen thousand one hundred and forty dollars and twenty-five cents, for money expended by him in burying the dead, relieving the sick and distressed, and building a hospital in Sacramento City, in the years eighteen hundred and forty-nine and eighteen hundred and fifty.

Resolved, That his excellency the governor be requested to forward to each of our senators and representatives in Congress a copy of these resolutions.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, April 4, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the above is a true and correct copy of a resolution for the relief of General A. M. Winn now on file in my office.

[L. S.] Witness my hand and the great seal of State, at office in Sacramento, California, the 4th day of April, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

5TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 1.

RESOLUTION

OF

THE LEGISLATURE OF CALIFORNIA,

IN BEHALF OF

General A. M. Winn.

DECEMBER 9, 1857.—Ordered to lie on the table and be printed.

CONCURRENT RESOLUTION for the relief of General A. M. Winn.

Resolved by the assembly, (the senate concurring,) That our senators be instructed, and our representatives in Congress requested, to use their best endeavors in bringing before Congress the claim of General A. M. Winn, for the sum of nineteen thousand one hundred and forty dollars and twenty-five cents, for money expended by him in burying the dead, relieving the sick and distressed, and building a hospital in Sacramento City, in the years eighteen hundred and forty-nine and eighteen hundred and fifty.

Resolved, That his excellency the governor be requested to forward to each of our senators and representatives in Congress a copy of these resolutions.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, April 4, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the above is a true and correct copy of a resolution for the relief of General A. M. Winn now on file in my office.

[L. S.] Witness my hand and the great seal of State, at office in Sacramento, California, the 4th day of April, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 2.

RESOLUTION

OF THE

LEGISLATURE OF CALIFORNIA,

IN FAVOR OF

The establishment of certain mail routes.

DECEMBER 9, 1857.—Ordered to lie on the table and be printed.

CONCURRENT RESOLUTION relative to certain mail routes.

Resolved by the assembly, (*the senate concurring*,) That our senators in Congress be, and they are hereby, instructed, and our representatives requested, to use their influence to procure a weekly mail, by ocean steamer, from San Francisco to San Diego, *via* Monterey, San Luis Obispo, Santa Barbara, and San Pedro, and overland from San Pedro, *via* Los Angeles, to San Bernardino; also, a weekly overland mail from Stockton to San Diego, *via* Millerton, Visulia, Woodville, the Sebastian Indian Reservation, Fort Tejon, Los Angeles, San Juan Capistrino, and San Luis Rey.

Resolved, That his excellency the governor is requested to transmit a copy of these resolutions to each of our senators and representatives in Congress.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, April 4, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the above is a true and correct copy of a resolution relative to mail routes in California now on file in my office.

Witness my hand and the great seal of State, at office in Sacra-
[L. S.] mento, California, the 4th day of April, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 3.

RESOLUTIONS

OF

THE LEGISLATURE OF CALIFORNIA,

IN FAVOR OF

The speedy construction of a national railroad from the valley of the Mississippi to some point in California.

DECEMBER 9, 1857.—Ordered to lie on the table and be printed.

JOINT RESOLUTIONS relative to Pacific Railroad.

Whereas the increasing demand of commerce, mail transportation, and the great and increasing emigration from the Atlantic States to the shores of the Pacific ocean eminently require the construction of a railroad from the valley of the Mississippi to some point in California:

And whereas we are of opinion that, incidental to the power conferred on Congress "to provide for the common defence and general welfare," "to declare war, repel invasion," Congress has power to construct a Pacific railroad (so national in its character) for facilitating the transportation of troops and munitions of war:

And whereas such a railroad, when completed, will be a highway and thoroughfare for the commercial nations of the earth; secure an easier and more frequent intercourse between the Pacific and Atlantic States of our Union; bring into market and cultivation the wild waste of public domain lying between the confines of the western States and the Sierra Nevada mountains; render us more secure from the invasion of any foreign power, and strengthen the peace and harmony that now so happily exist between the States of the republic: Therefore—

Resolved by the senate and assembly, That the legislature of California again earnestly urge upon the attention of Congress the speedy construction of a national railroad from the great valley of the Mississippi to some point in California.

Resolved, That, in the opinion of this legislature, Congress has the constitutional power to appropriate either money or lands, or both, to construct a railroad connecting the Atlantic and Pacific oceans.

Resolved, That our senators in Congress be instructed, and our representatives requested, to use all constitutional means to procure the passage of a law embracing the objects contained in the above resolutions: *Provided*, That nothing contained in these resolutions shall be construed as to mean that the Congress of the United States

possess the power to carry on a general system of internal improvements within any State.

Resolved, That his excellency the governor be requested to transmit a copy of the above preamble and resolutions to each of our senators and representatives in Congress, and to the President of the United States.

E. T. BEATTY,
Speaker of the Assembly.
T. H. DOSH,
President of the Senate pro tempore.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, April 3, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the above is a true and correct copy of a resolution relative to a Pacific railroad now on file in my office.

[SEAL.] Witness my hand and the great seal of State, at office in Sacramento, California, the third day of April, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 4.

RESOLUTION

OF

THE LEGISLATURE OF CALIFORNIA,

IN BEHALF OF

William Grove Deal.

DECEMBER 10, 1857.—Ordered to lie on the table and be printed.

CONCURRENT RESOLUTION for the relief of William Grove Deal.

Resolved by the assembly, the senate concurring, That our senators be instructed, and our representatives in Congress requested, to use their efforts to procure the passage of a law by Congress appropriating the sum of fifteen thousand two hundred and eighty dollars to William Grove Deal, for relief given to the indigent sick at Sacramento city, in the years eighteen hundred and forty-nine and eighteen hundred and fifty.

Resolved, That his excellency the governor be requested to forward to each of our senators and representatives in Congress a copy of these resolutions, together with a copy of the memorial annexed.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, April 3, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the above is a true and correct copy of a resolution for the relief of William Grove Deal now on file in my office.

[L. S.] Witness my hand and the great seal of State, at office in Sacramento, California, the third day of April, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC No. 5.

RESOLUTIONS

OF

THE LEGISLATURE OF CALIFORNIA,

IN FAVOR OF

A uniform rate of postage throughout the United States, and the payment by the government for all "free postage matter," or the abolition of the "franking privilege."

DECEMBER 10, 1857.—Ordered to lie on the table and be printed.

JOINT RESOLUTIONS in relation to a uniform rate of postage throughout the United States.

Whereas a uniform rate of postage throughout the United States and Territories is most desirable: Therefore—

Resolved by the senate and assembly of the State of California, That our senators in Congress be instructed, and our representatives requested, to advocate the passage of a general and uniform postage law, not to exceed three cents on letters of half an ounce or under, and two cents for every additional half ounce.

Resolved, That our senators in Congress be instructed, and our representatives requested, to advocate the passage of a law requiring the general government to pay for all "free postage matter," or, in default thereof, the abolition of the "franking privilege."

Resolved, That his excellency the governor be requested to transmit a copy of the above preamble and resolutions to each of our senators and representatives in Congress.

E. T. BEATTY,
Speaker of the Assembly.
R. M. ANDERSON,
President of the Senate.

Endorsed as follows:

Originated in the assembly January 16, 1857.

Passed the assembly January 20, 1857.

WILL. CAMPBELL,
Clerk of Assembly.

Passed the senate January 22, 1857.

GEO. S. EVANS,
Secretary of the Senate.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, February 27, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the annexed is a true and correct copy of a resolution of the senate and assembly of the State of California now on file in my office.

[SEAL.] Witness my hand and the great seal of State, at office in Sacramento, California, the 27th day of February, A. D. 1857.

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 6.

RESOLUTION

OF

THE LEGISLATURE OF CALIFORNIA,

IN FAVOR OF

An additional allowance to the officers and men of the army while serving in the Pacific division, and also to the officers connected with the Light-house Board of that coast.

DECEMBER 10, 1857.—Ordered to lie on the table and be printed.

CONCURRENT RESOLUTION relative to the pay of United States army officers in the Pacific division.

Resolved, the senate concurring, That our senators be instructed, and our representatives requested, to advocate the passage of a law by Congress for an additional allowance to the officers and men of the United States army while serving in the Pacific division, and also the officers connected with the Light-house Board of this coast.

Resolved, That the governor be requested to transmit a copy of the above resolution to the Secretary of War, and to each of our senators and representatives in Congress.

E. T. BEATTY,
Speaker of the Assembly.

R. M. ANDERSON,
President of the Senate.

OFFICE OF SECRETARY OF STATE,
Sacramento, California, Feb. 27, 1857.

I, David F. Douglass, secretary of state of the State of California, do hereby certify that the abve is a true and correct copy of a resolution of the senate and assembly of the State of California now on file in my office.

Witness my hand and the great seal of State, at office in Sacramento, California, the twenty-seventh day of February, A. D. 1857.

[SEAL.]

DAVID F. DOUGLASS,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 8.

LIST OF COMMITTEES

OF

THE SENATE OF THE UNITED STATES,

FOR THE

FIRST SESSION OF THE THIRTY-FIFTH CONGRESS.

DECEMBER 16, 1857.

On Foreign Relations.

Mr. Mason, chairman,
Douglas,
Slidell,
Polk,
Crittenden,
Seward,
Foot.

On Finance.

Mr. Hunter, chairman,
Pearce,
Gwin,
Bright,
Biggs,
Fessenden,
Cameron.

On Commerce.

Mr. Clay, chairman,
Benjamin,
Bigler,
Toombs,
Reid,
Allen,
Hamlin.

On Military Affairs and the Militia.

Mr. Davis, chairman,
Fitzpatrick,
Johnson, of Ark.,
Iverson,
Broderick,
Wilson,
King.

On Naval Affairs.

Mr. Mallory, chairman,
Thomson, of N. J.,
Slidell,
Allen,
Evans,
Bell,
Hale.

On the Judiciary.

Mr. Bayard, chairman,
Toombs,
Pugh,
Benjamin,
Green,
Collamer,
Trumbull.

On Post Offices and Post Roads.

Mr. Yulee, chairman,
Bigler,
Gwin,
Fitch,
Thomson, of N. J.,
Hale,
Dixon.

On Public Lands.

Mr. Stuart, chairman,
Johnson, of Ark.,
Pugh,
Broderick,
Johnson, of Tenn.,
Foster,
Harlan.

On Private Land Claims.

Mr. Benjamin, chairman,
Biggs,
Thompson, of Ky.,
Kennedy,
Durkee.

On Indian Affairs.

Mr. Sebastian, chairman,
Brown,
Reid,
Fitch,
Bell,
Houston,
Doolittle.

On Pensions.

Mr. Jones, chairman,
Thomson, of N. J.,
Clay,
Bates,
Thompson, of Ky.,
Foster,
King.

On Revolutionary Claims.

Mr. Evans, chairman,
Bates,
Crittenden,
Wilson,
Durkee.

On Claims.

Mr. Iverson, chairman,
Mallory,
Polk,
Simmons,
Clark.

On the District of Columbia.

Mr. Brown, chairman,
Mason,
Johnson, of Tenn.,
Bigler,
Kennedy,
Hamlin,
Chandler.

On Patents and the Patent Office.

Mr. Reid, chairman,
Evans,
Yulee,
Simmons,
Trumbull.

On Public Buildings and Grounds.

Mr. Bright, chairman,
Davis,
Douglas,
Bayard,
Clark.

On Territories.

Mr. Douglas, chairman,
Jones,
Sebastian,
Fitzpatrick,
Green,
Collamer,
Wade.

To Audit and Control the Contingent Expenses of the Senate.

Mr. Evans, chairman,
Wright,
Dixon.

On Printing.

Mr. Johnson, Ark., chairman,
Fitzpatrick,
Cameron.

On Engrossed Bills.

Mr. Wright, chairman,
Bigler,
Harlan.

On Enrolled Bills.

Mr. Jones, chairman,
Brown,
Doolittle.

On the Library.

Mr. Pearce, chairman,
Bayard,
Hunter.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 9.

RESOLUTIONS

OF

THE LEGISLATURE OF MASSACHUSETTS,

IN RELATION TO

The claim of that State against the United States for militia services during the last war with Great Britain.

DECEMBER 17, 1857.—Referred to the Committee on Claims and ordered to be printed.

COMMONWEALTH OF MASSACHUSETTS.

IN THE YEAR ONE THOUSAND EIGHT HUNDRED AND FIFTY-SEVEN.

RESOLVES concerning the Massachusetts claim against the general government.

Resolved, That our senators and representatives in Congress be, and they hereby are, requested to use their best endeavors to procure an early and complete adjustment of the claim of Massachusetts against the general government for militia services rendered during the late war with Great Britain.

Resolved, That his excellency the governor be requested to forward a copy of the foregoing resolve to each of our senators and representatives in Congress.

HOUSE OF REPRESENTATIVES, *May* 6, 1857.

Passed.

CHARLES A. PHELPS, *Speaker*.

IN SENATE, *May* 7, 1857.

Passed.

CHARLES W. UPHAM, *President*.

MAY 8, 1857.

Approved.

HENRY J. GARDNER.

SECRETARY'S OFFICE, BOSTON, *May* 19, 1857.

A true copy.
Attest:

FRANCIS DE WITT,
Secretary of the Commonwealth.

MEMORIAL

OF

THE LEGISLATURE OF MISSOURI,

FOR

An appropriation of public lands to build a railroad from Springfield, in Greene county, to or near Gillis' Bluff, in said State, on the Cairo and Fulton railroad.

DECEMBER 17, 1857.—Referred to the Committee on Public Lands.
DECEMBER 18, 1857.—Ordered to be printed.

MEMORIAL to Congress for lands for the South Missouri railroad.

Your memorialists, the general assembly of the State of Missouri, would respectfully represent: The people of Missouri feel a deep and lively interest in the subject of internal improvement, and feel the great necessity of progressing with such public works, in order more successfully to avail themselves of the natural advantages by which they are surrounded in opening up ways to market for the surplus produce of their labor and industry, thereby inducing a speedy settlement and cultivation of the large amount of rich and fertile lands which remain to a great extent uninhabited in the State, and in aiding in the development of its inexhaustible resources, and, when developed, will add correspondingly to the wealth of Missouri and the Union. Your memorialists state that one object of internal improvement of great magnitude and importance, and in regard to which the people in the southern and southwestern portions of this State feel a great interest, is the construction of a railroad from Springfield, in Greene county, Missouri, to Gillis' Bluff, or near to that point in the State, and on the Cairo and Fulton railroad, thereby furnishing the people of southern and southwestern Missouri with a more convenient outlet to market nearest and most suitable to them, and, in its tendency, will blend together the interests of the southeast and southwestern portions of the State. The country through which the proposed road is to pass possesses a soil susceptible of becoming a great agricultural community. Its facilities for commerce are so limited, the difficulties attending the transportation of its products to market so numerous, that its progress to greatness and wealth are greatly impeded, as well as the value of real estate in that region deteriorated. Such a road would obviate all these difficulties, by giving a large and fertile sec-

tion of country immediate access at all times to the best markets of the country, and by attracting the tide of emigration to that region, and thereby greatly enhance the value of every species or description of property. It would not only impart new life and energy to the agriculture of that part of the State, but would excite and develop a mining interest in that region not to be estimated. It would not only impart vigor in the agriculture and mining interests, but would call in requisition and put in active operation every variety of useful enterprise.

The construction of this road, and the consequent improvement and increase of wealth and enterprise of that region of country, would very greatly accelerate the sale of public lands belonging to the United States and along the course of the road, and would at the same time enhance the value of the public as well as the private property. Your memorialists would further represent that, in consequence of the remoteness of the country along the proposed road, and the great amount of public lands remaining unsold in this State, many years must elapse before any considerable amount of said lands along the line will be sold, settled, or cultivated, without some such improvement is made. Your memorialists would therefore ask that Congress donate to the State of Missouri, for the purpose of constructing said road, alternate sections of the public lands, and unappropriated lands within ten miles on each side of its proposed route; and also to grant the right of way for said road over any public lands of the United States through which it may pass.

With the aid thus added to the means which the State of Missouri could appropriate to this object, and which those interested would cheerfully invest in such a work, it is confidently believed it might be completed in a few years, and greatly promote the interest of the State of Missouri, and also the general government.

R. C. HARRISON,
Speaker of the House of Representatives.

H. JACKSON,
President of the Senate.

Approved February 11, 1857.

TRUSTEN POLK.

I, B. F. Massey, secretary of state, hereby certify the foregoing to be a true and full copy of the original roll now on file in this office.

In testimony whereof, I have hereto set my name and affixed [L. S.] the seal of office. Done at the office of secretary of state, at the city of Jefferson, this 28th day of September, A. D. 1857.

B. F. MASSEY,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 11.

MEMORIAL

OF

THE LEGISLATURE OF MISSOURI,

PRAYING

That the unsurveyed swamp lands may be patented to that State without being surveyed.

DECEMBER 17, 1857.—Referred to the Committee on Public Lands.
DECEMBER 18, 1857.—Ordered to be printed.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, the general assembly of the State of Missouri, would respectfully represent: That by an act entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, there was granted to the State of Missouri *the whole of the swamp and overflowed lands made unfit thereby for cultivation* within its boundaries, to *enable said State to construct levees and drains to reclaim said lands*, and providing that the proceeds of said lands should be applied as far as necessary to the purpose of *reclaiming said lands*, and also providing that the Secretary of the Interior should make out a list of said lands, and include therein all legal subdivisions, the greater part of which was wet and unfit for cultivation. Your memorialists represent that there is in the southeastern part of the State large bodies of land which are perfect swamps, subject to inundation and overflow, and totally unfit for cultivation; which lands have never been surveyed, and have been returned to the office of the surveyor general as being inaccessible and not susceptible of being surveyed; and that those lands, together with the adjoining lands in Arkansas, (being the "big swamp," reaching from Cape Girardeau, in Missouri, to Helena, in Arkansas,) were the lands specially intended by the State of Arkansas when she asked the donation, and would have been the only lands granted by said act, had it passed in its original form and not been extended to other States, and that said lands can be partially reclaimed, and perhaps large portions thereof made susceptible of cultivation, and, were it done, would, to a great extent, remove the now impassable barrier between the counties bordering on said swamp and the river, and also drain and dry up the marshes and swamps therein, now the fruitful source of malaria and disease. Your memorialists would further represent that it was obviously the intention of Congress, and is so stated

in plain terms, to grant to said States *the whole of the swamp and overflowed lands* in their respective limits, especially that portion which was so swampy, wet, and overflowed, that it could not be surveyed; but the Secretary of the Interior has so construed said act as not to include *the whole of the swamp and overflowed lands* in said States, but only such as have been surveyed, thereby leaving all of the worst swamp and overflowed lands unreclaimed, and rendering almost entirely nugatory the act (so far as said lands are concerned) in accomplishing the intention of Congress, which was to enable the several States to reclaim the swamp lands within their limits. Another evil has resulted from the practical operation of the act. The avowed intention of Congress in donating all the swamp lands was their reclamation, and that the best of the lands should be used to assist in reclaiming the worst, and therefore when the larger part of a subdivision was swamps they granted the whole of it; but, under the operation of the act as construed, only the better part of the swamp and overflowed lands, namely, those which have been surveyed, have passed to the State under the grant; and as the State was bound by the act *to apply the proceeds exclusively to the purpose of reclaiming said lands by means of levees and drains*, and such having been the action of those entrusted with the work, the proceeds of the best parts of said lands are being rapidly disposed of, while the real swamps, for which the grant was intended, still remain the property of the United States, unreclaimed, valueless, and a nuisance to that portion of our State. Your memorialists would therefore ask that your honorable body will so amend said act, or make such other enactments as may be necessary to enable the Secretary of the Interior to fully carry out the intentions of Congress in making said grant; and we would recommend that said act be so amended as to authorize the Secretary of the Interior to issue a patent for said unsurveyed lands, without attempting to survey them, believing that such attempt would be useless expense, and impracticable until said lands are at least partially reclaimed.

R. C. HARRISON,
Speaker of the House of Representatives.
H. JACKSON,
President of the Senate.

Approved January 29, 1857.

TRUSTEN POLK.

I, B. F. Massey, secretary of state, hereby certify the foregoing to be a full and correct copy of the original roll now on file in this office. Done at the office of the secretary of state, in the city of Jefferson, this 29th day of September, A. D. 1857.

[L. S.]

B. F. MASSEY,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 12.

RESOLUTION

OF

THE LEGISLATURE OF THE STATE OF MAINE,

IN RELATION TO

Foreign paupers and criminals.

DECEMBER 18, 1857.—Referred to the Committee on Foreign Relations and ordered to be printed.

STATE OF MAINE.

RESOLVE relating to foreign paupers and criminals.

Resolved, That our senators in Congress be directed, and our representatives requested to urge upon the consideration of Congress the necessity of passing a law, imposing severe penalties, against the introduction or importation into this country of foreign paupers and foreign criminals, since the introduction of such persons imposes unreasonable taxes upon the citizens, corrupts the public morals, and endangers the public safety.

Resolved, That the governor be, and hereby is, requested to forward a copy of these resolves to each of our members of Congress.

IN THE HOUSE OF REPRESENTATIVES, *April* 15, 1857.

Read and passed.

C. A. SPOFFORD, *Speaker*.

IN THE SENATE, *April* 15, 1857.

Read and passed.

HIRAM CHAPMAN, *President pro tem.*

APRIL 15, 1857.

Approved.

JOSEPH H. WILLIAMS.

SECRETARY'S OFFICE, AUGUSTA, *April* 24, 1857.

I hereby certify that the foregoing is a true copy of the original deposited in this office.

ALDEN JACKSON, *Secretary of State.*

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 13.

RESOLUTION

OF

THE LEGISLATURE OF THE STATE OF MAINE,

IN RELATION TO

The bounty on cod fisheries.

DECEMBER 18, 1857.—Referred to the Committee on Commerce, and ordered to be printed.

STATE OF MAINE.

RESOLVE in relation to bounty on cod fisheries.

Whereas commerce is one of the great interests that lie at the foundation of the prosperity of every nation, and has received, and should receive, from the hands of our government a fostering care and protection; and to advance that great interest, and to furnish a nursery of seamen for the navy in time of actual war, led to the adoption of the existing laws granting bounties to fishermen, and the policy of so doing was approved by James Madison; and further, seamen fitted for the naval service can be had only by long and severe training, and as a matter of economy it is far better that such a nursery of seamen should exist by means of the slight bounties now given than that government should undertake, in time of peace, to train such a number as would be actually required in time of war; and still further, all the principal commercial and maritime nations have made it a point to pursue this policy for the purpose of furnishing for their navy a sufficient number of experienced and skilful seamen: Therefore—

Resolved, That our senators and representatives in Congress be requested to adopt such measures as, in their judgment, they shall deem best to prevent the disturbing of the present laws granting bounties to fishermen.

In the house of representatives, February 16, 1857.—Read and passed.

C. A. SPOFFORD, *Speaker*.

In senate, February 17, 1857.—Read and passed.

J. H. WILLIAMS, *President*.

Approved February 17, 1857.

H. HAMLIN.

SECRETARY'S OFFICE, AUGUSTA, *May* 1, 1857.

I hereby certify that the foregoing is a true copy of the original deposited in this office.

ALDEN JACKSON, *Secretary of State*.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 14.

RESOLUTIONS

OF THE

LEGISLATURE OF THE STATE OF MAINE,

IN RELATION TO

The decision of the Supreme Court of the United States in the case of Dred Scott.

DECEMBER 18, 1857.—Ordered to lie on the table and be printed.

STATE OF MAINE.

RESOLVES in relation to the decision of the Supreme Court of the United States in the case of Dred Scott.

Whereas the Supreme Court of the United States, in the recent case of Dred Scott, over which it expressly declared it had no jurisdiction, has undertaken to pronounce an extra-judicial opinion, prohibiting the people of the United States from any control of the question of slavery within the Territories of the United States, either through Congress, or local governments instituted under the authority of Congress, or otherwise; and

Whereas such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, who are thereby enabled to carry the odious institution of slavery wherever the national power extends, and pre-dooms all territory which the United States may hereafter acquire, by purchase or otherwise, to a law of slavery as irrepealable as the organic Constitution of the country; and

Whereas such extra-judicial opinion of a geographical majority of the Supreme Court is conclusive proof of the determination of the slaveholding States to subvert all the principles upon which the

American Union was formed, and degrade it into an engine for the extension and perpetuation of the barbarous and detestable system of chattel slavery: Therefore—

Resolved, That the extra-judicial opinion of the Supreme Court of the United States in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States, and that it is of an import so alarming and dangerous, as to demand the instant and emphatic reprobation of the country.

Resolved, That the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction, and make it a tribunal whose decisions shall be in harmony with the Constitution of the United States and the spirit of our institutions, and at whose hands all classes of persons in the United States, without regard to race or locality, shall receive even and exact justice.

Resolved, That until this extra-judicial opinion of the Supreme Court, establishing slavery in all the Territories of the United States, and placing it beyond the reach of Congress or the people, is reversed and set aside, and until the advance of our national flag ceases to be the advance of slavery, it will be the paramount duty of the supporters of justice and liberty to resist any further acquisition of territory which may be attempted, under whatever disguise, with the purpose of enlarging the area of an institution which is the scandal of this country and age.

Resolved, That the independent right of each State to determine who shall be admitted to political franchise and citizenship within its own limits is clear and indisputable, and is to be exercised without question by any other State, and that persons admitted to the rights of citizenship by any State are, by the plain letter of the Constitution of the United States, "entitled to all the privileges and immunities of citizens in the several States."

Resolved, That whatever may be the course of political events elsewhere, the people of Maine are determined to abide by, and make effective within the limits of their own sovereign jurisdiction, the principles of the Declaration of American Independence, the Constitution of the United States, and the constitution of this State, which ordained "to establish justice" and "secure the blessings of liberty," declares that "all men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Resolved, That Maine will not allow slavery within its borders, in any form or under any pretence, for any time, however short, let the consequences be what they may.

Resolved, That his excellency the governor be requested to forward a copy of these resolutions to the governors of the several States and Territories of the Union, to be laid before the legislative authorities thereof, and to each of our senators and representatives in Congress,

to be laid before the Senate and House of Representatives of the United States.

In the house of representatives, April 15, 1857.—Read and passed.
C. A. SPOFFORD, *Speaker.*

In the senate, April 15, 1857.—Read and passed.
HIRAM CHAPMAN, *President pro tem.*

April 15, 1857.—Approved.
JOSEPH H. WILLIAMS.

A true copy—Attest:
ALDEN JACKSON, *Secretary of State.*

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 15.

RESOLUTION

OF THE

LEGISLATURE OF THE STATE OF MAINE,

IN RELATION

To claims of citizens of the United States to indemnity for spoliations by French cruisers prior to 1800.

DECEMBER 18, 1857.—Ordered to lie on the table and be printed.

STATE OF MAINE.

RESOLVES respecting French spoliations.

Whereas spoliations were committed upon the commerce of citizens of the United States by French cruisers prior to and during the year 1800, and by a treaty with France the government of the United States has forever inhibited the sufferers from preferring their claims against the French government, but relinquished them to France for a valuable consideration: Therefore—

Resolved, That the government of the United States is bound, by every principle of honor and justice, to make speedy provision for indemnifying its citizens for losses sustained by French vessels prior to the ratification of the treaty of 1800.

Resolved, That our senators be instructed, and our representatives be requested, to bring this subject to the early consideration of the next Congress, and to use their influence to procure the passage of a law making provision for those who suffered as aforesaid.

Resolved, That the governor of this State be requested to furnish our senators and representatives in Congress with a copy of these resolutions at the opening of the next Congress.

In the house of representatives, March 5, 1857.—Read and passed.
C. A. SPOFFORD, *Speaker.*

In senate, March 5, 1857.—Read and passed.
HIRAM CHAPMAN, *President pro tem.*

March 6, 1857.—Approved.
JOSEPH H. WILLIAMS.

SECRETARY'S OFFICE,
Augusta, April 29, 1857.

I hereby certify that the foregoing is a true copy of the original deposited in this office.

ALDEN JACKSON,
Secretary of State.

35TH CONGRESS, 1st Session. } SENATE. { MISS. DOC. No. 16.

RESOLUTIONS

OF

THE LEGISLATURE OF MASSACHUSETTS,

IN FAVOR OF

The recognition of Hayti and Liberia as sovereign and independent States.

DECEMBER 18, 1857.—Referred to the Committee on Foreign Relations, and ordered to be printed.

COMMONWEALTH OF MASSACHUSETTS.

IN THE YEAR ONE THOUSAND EIGHT HUNDRED AND FIFTY-SEVEN.

RESOLVES respecting Hayti and Liberia.

Whereas there is a great, profitable, and increasing trade between the United States and Hayti, amounting in the year 1856 to more than four and a half millions of dollars, employing eighty-seven thousand five hundred and ninety-eight tons of American shipping, navigated by three thousand six hundred and four American seamen, and seventeen thousand four hundred and thirty-one tons of foreign shipping; and

Whereas, in the absence of a commercial treaty between the United States and Hayti, the commerce between the two countries is governed on the part of Hayti by such local laws as may from time to time be decreed, subject to sudden changes, and dependent on the caprice of an absolute monarch; and

Whereas full one-half of the foreign trade of Hayti is with the United States, furnishing a ready market for our fish, pork, beef, flour, rice, furniture, cotton goods, and is every year becoming more important and more necessary to both countries; and

Whereas Hayti has been *de facto* an independent state since January, eighteen hundred and one, by a declaration of her independence, and *de jure* since July, eighteen hundred and twenty-five, by the recognition of France, under Charles the Tenth, which independence has since been confirmed by treaties passed and ratified between the governments of France and Hayti; and

Whereas Hayti has given proof of her ability to maintain her in-

dependence by successful efforts against the armies of several European nations, and has adopted and sustained a regular government, and has caused her neutrality to be respected by belligerents ; and

Whereas Hayti has the attributes of a sovereign state, and as such has been recognized by Great Britain and by several powers of continental Europe, who are duly represented in Hayti, conformably to the comity of nations ; and

Whereas the people of Liberia, by their history and position, and by the efforts they are now making to improve their social, intellectual and religious character, have strong claims upon the sympathy of all civilized and Christian powers, especially of the United States ; and

Whereas the republic of Liberia is an independent nation, possessed of the materials of a profitable commerce, and is capable by its position of contributing to that great object of humanity, the suppression of the slave trade, and to the general interests of civilization and freedom and religion in Africa: Therefore—

Resolved, That our senators and representatives at Washington be, and hereby are, requested to urge upon Congress the importance of recognizing Hayti and Liberia as independent and sovereign states, and of placing our diplomatic and commercial relations with them on the same footing as those of other independent nations.

Resolved, That his excellency the governor be, and hereby is, requested to cause copies of these resolves to be transmitted to each of our senators and representatives in Congress.

House of representatives, May 23, 1857.—Passed.

CHARLES A. PHELPS, *Speaker*.

In senate May, 25, 1857.—Passed.

CHARLES W. UPHAM, *President*.

May 26, 1857.—Approved.

HENRY J. GARDNER.

SECRETARY'S OFFICE, BOSTON, *June* 1, 1857.

A true copy.

Attest:

F. DEWITT,
Secretary of the Commonwealth.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 17.

IN THE SENATE OF THE UNITED STATES.

JANUARY 19, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CORNELIUS BOYLE, ADMINISTRATOR, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Evidence submitted in support of the claim transmitted to the House of Representatives only.
3. Opinion of the Court on the facts.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this nineteenth day of January, A. D. 1857.
[L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

CORNELIUS BOYLE, administrator of JOHN BOYLE, deceased, *vs.* THE UNITED STATES.

To the honorable the Court of Claims:

The petition of Cornelius Boyle, administrator of John Boyle, deceased, of the city of Washington, in the District of Columbia, respect-

fully showeth: That the said John Boyle, while in life, was, for a number of years the chief clerk of the Navy Department of the United States, and duly and faithfully performed all the duties of his said office; add that, whilst so acting, he was at various times appointed by the President of the United States, for the time being, for good and sufficient reasons, to act as Secretary of the Navy, under and by virtue of the powers conferred on the President by the act of Congress of the 8th May, 1792, (U. S. Statutes at Large, vol. 1, page 281,) and of February 13, 1795, vol. 1, page 415. And that, under said appointments, he did act as Secretary of the Navy, from the 21st day of March, 1831, to the 14th day of April, 1831, both days inclusive; from the 12th day of May, 1831, to the 23d day of May, 1831, both days inclusive; from the 16th day of June, 1831, to the 23d June, 1831, both days inclusive; from the 10th day of August to the 20th day of September, both days inclusive; also on the 3d day of December, 1831, the 6th day of January, 1832, and the 19th day of January, 1832; from the 11th to the 14th day of August, 1832, both days inclusive; from the 3d of April to the 25th day of May, 1833, both days inclusive; from the 11th June to the 5th day of July, 1833, both days inclusive; from the 3d day of August to the 5th day of September, 1833, both days inclusive; on the 4th and 7th days of January, 1834; on the 10th, 11th, and 31st days of January, 1834; from the 11th day of June to the 13th day of September, 1834, both days inclusive; on the 3d day of December, 1834; on the 29th day of January, 1835; from the 7th May to the 17th day of June, 1835, both days inclusive; on the 1st day of July, 1835; from the 6th to the 18th day of July, 1835, both days inclusive; on the 7th day of August, 1835; on the 23d and 24th days of October, 1835; on the 2d day of February, 1836; from the 13th July to the 18th day of August, 1836, both days inclusive; from the 13th July to 31st day of July, 1837, both days inclusive; from the 23d to the 28th day of October, 1837, both days inclusive; from the 23d to the 27th day of July, 1838, both days inclusive, and from the 6th of October to the 5th of November, 1838, both days inclusive—making, in the whole, four hundred and fifty-four days that the said John Boyle acted as Secretary of the Navy, and for which said services so rendered as aforesaid, your petitioner is advised and believes the said John Boyle, in his lifetime, and he as administrator since his death, has a just claim, to be paid at the rate of $6,000 per annum. Your petitioner would further state, that the account was made out charging the government of the United States at that rate for the sum of $7,462 27, less the amount of $2,486 53, the amount paid the said John Boyle, as chief clerk during the time, leaving a balance of $4,975 74, which, being presented at the proper department, was disallowed.

In this statement your petitioner is advised an error was committed to the prejudice of the estate of his intestate, by including the sum of $2,486 53, the salary of chief clerk. He is advised that his intestate, filling two offices by regular and lawful appointments, was entitled to the salary of both offices; and there is justly due him from the government the sum of $7,462 27, instead of the sum of $4,975 74, in said account erroneously stated.

Your petitioner further states, that he is owner of said claim as administrator of John Boyle; and the distributees of the said deceased are the only beneficiaries of said claim, and that it has never been assigned or transferred to any one.

He prays judgment for the sum of $7,462 27.

CORNELIUS BOYLE.

S. S. BAXTER,
J. BRYAN,
For Petitioner.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss.*

This day Cornelius Boyle personally appeared before me, a justice of the peace in and for said county, and made oath that the statements made in this petition, of his own knowledge, were true, and those made on the information of others he believed to be true.

Given under my hand this 12th day of May, 1856.

B. K. MORSELL, *J. P.*

IN THE COURT OF CLAIMS.

CORNELIUS BOYLE, administrator of JOHN BOYLE, deceased, *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

John Boyle, in his lifetime, was for many years the chief clerk of the Department of the Navy of the United States, and during his continuance in that office he was, at various times between the twenty-first day of March, A. D. eighteen hundred and thirty-one, and the fifth day of November, A. D. eighteen hundred and thirty-eight, appointed Secretary of the Navy *ad interim*, or Acting Secretary of the Navy, and, under those appointments, he performed the duties of Secretary of the Navy four hundred and sixty-six days. The petitioner now claims compensation for the services thus rendered by his intestate at the rate of six thousand dollars per annum, that being the salary then allowed by law to the Secretary of the Navy.—(3 Stat. at L., p. 484.) During the whole period above mentioned the petitioner's intestate regularly received from the United States his salary as the chief clerk in the Department of the Navy.

By an act of Congress, approved May 8, A. D. 1792, it is provided "that in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or Secretary of the War Department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor

be appointed, or until such absence or inability by sickness shall cease."—(1 Stat. at L., p. 281.)

By an act of Congress, approved February 13, A. D. 1795, it was provided "that in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or Secretary of the Department of War, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in that manner, for a longer term than six months."—(1 Stat. at L., p. 415.)

When these acts were passed the Department of the Navy had not been created. The duties which were subsequently devolved on that department then pertained to the Department of War.—(1 Stat. at L., p. 50.) By an act approved April 30, A. D. 1798, the Department of the Navy was established. The first section of that act provides "that there shall be an executive department under the denomination of the Department of the Navy, the chief officer of which shall be called the Secretary of the Navy, whose duty it shall be to execute such orders as he shall receive from the President of the United States relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States."—(1 Stat. at L., p. 553.) The second section of that act is as follows: "That a principal clerk and such other clerks as he shall think necessary, shall be appointed by the Secretary of the Navy, who shall be employed in such manner as he shall deem most expedient. In case of vacancy in the office of the Secretary, by removal or otherwise, it shall be the duty of the principal clerk to take the charge and custody of all the books, records, and documents of the said office."—(Ibid. p. 554.)

There is no express provision in any act of Congress extending the provisions of the act of 1792 or of the act of 1795 to the Department of the Navy. The power conferred by those acts upon the President to make temporary appointments in the Departments of State, of the Treasury, and of War, has, however, been often exercised by him in regard to the Department of the Navy In a letter of the present Attorney General to the President, dated March 8, A D. 1854, he says: "The existing legislation leads to opposite and contradictory conclusions. It may be said, on the one hand, that the power expressly conferred on the President in three of the departments may be applied by analogy to others. On the other hand, it may be said that the express enactment conferring the power on the President in those three cases, and making special peculiar legal provision in regard to a fourth, is the implied exclusion of any power of the President as to the remaining three. Perhaps the true view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one. It has been exercised in regard to all the departments." We are not prepared to assent to the doctrine that the power is a constitutional

one in the sense that it is conferred upon the President by the Constitution itself. It seems to us, however, to be by no means a strained construction of the acts of 1792 and 1795, to consider them applicable to the Navy Department. At the time of their enactment the duties, which were afterwards devolved upon the Department of the Navy, pertained to the Department of War. They are both executive departments, created as necessary and proper agents to enable the President to perform his duties. Hence, *quoad* these statutes, the Department of the Navy may be regarded as still a part of the Department of War, and, consequently, these statutes may be regarded as applicable to the Department of the Navy. We have the less difficulty in adopting this construction from the consideration that it has been acted upon without question for more than half a century. *Contemporanea expositio est fortissima in lege.* The statutes are beneficial in their character and to be construed liberally.

The President, then, in authorizing the petitioner's intestate to perform the duties of Secretary of the Navy in the several instances already mentioned, acted under and in pursuance of the act of 1792. The questions now presented for our consideration, therefore, are substantially the same as those decided by this Court in the late case of Asbury Dickens *vs.* The United States. In that case, we held, that the meaning of the 9th section of the act of 1818, entitled "An act to regulate and fix the compensation of the clerks in the different offices," (3 Stat. at Large, 447,) is, that no clerk in any of the departments shall receive, *as clerk*, any other compensation than is authorized by that act; but that he is not thereby inhibited from receiving compensation for the discharge, whilst holding the office of clerk, of the duties of any other office, which may be lawfully conferred on him; and (2) that when the President, under the 8th section of the act of 1792, authorizes any person to perform the duties of Secretary of State, such person is thereby invested with an office, and becomes entitled, during his continuance therein, to the compensation provided by law for the services required of him; and that, if such person be a clerk in one of the departments, he is entitled to such compensation in addition to his salary as clerk. We based our decision on the second point upon the authority of the case of the United States *vs.* White, in the circuit court of Maryland, which we considered precisely analogous to the case then before us.

That a Secretary *ad interim*, usually called Acting Secretary, appointed under the act of 1792, holds a public office, is a proposition which seems to us to be indisputable. Blackstone defines a public office to be a right to exercise a public employment, and to take the fees and emoluments thereunto belonging.—(2 Blk. Com., 36.) Judge Tucker adopts the following definition: "A public office is an authority to receive a public employment, coupled with a right to take the fees and enjoy the emoluments and benefits thereof; and with the duty of fulfilling it according to law."—(1 Tuck. Com., Book II., 9.) According to Chancellor Kent, offices consist in a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it.—(3 Kent's Com., 8th ed., 567–8.) Every man, says Bacon, is a public officer, who hath any duty concerning

the public.—(5 Bac. Ab., title, Offices and Officers, (A.,) 180, citing Carth., 479.) Tested by either of these definitions, a Secretary *ad interim* is a public officer, and his employment, or trust, a public office. He exercises a public employment, under the authority of law, and is obliged to perform the duties pertaining to that employment, while he continues therein, whether he will or not. It would be difficult to conceive that anything else can be necessary to constitute this a public office, except the right to take the fees and emoluments thereof.

It seems to us to be equally plain, that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary, for it exists simultaneously with that office, and both may be full at the same time. We do not consider that the mere fact that the *duties* of both officers are the same makes the offices themselves identical. The office of Secretary *ad interim* is temporary in its character, whilst that of Secretary is of a more permanent nature. The latter is emphatically the head of his department, whilst the former is only authorized to perform the duties of the Secretary in case of his death, absence from the seat of government, or sickness, until a successor be appointed, or until such absence or inability by sickness shall cease. The one may be considered inferior to the other. The relation in which they stand to each other is somewhat analogous to that of principal and deputy, especially in this, that the Secretary *ad interim* can perform *all the duties* of Secretary, and yet he is not Secretary. The President nominates, and by and with the advice and consent of the Senate appoints, the Secretary; but Congress has by law vested the appointment of the Secretary *ad interim*, or Acting Secretary, in the President alone. Whether the heads of departments are to be deemed inferior officers, in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate, has never been determined, and is still an unsettled question.—(2 Story's Com. on the Con., §1536, n, 1.) As it is not probable that Congress ever will vest the appointment of the heads of departments in the President alone, this question is practically of no importance, and will probably never be settled. But Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and, we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone —(Con. U. S., Art. II. § 2, p. 2.)

The office of Secretary *ad interim* is not the office of the chief clerk in a department, or any part of it. The chief clerk is not *ex officio* bound, nor does he *ex officio* have the right, to perform the duties of a Secretary *ad interim*. To the office of chief clerk is annexed by law its own peculiar and appropriate duties; and to perform the duties of the Secretary, in any of the contingencies contemplated by the act of 1792, is not one of them. The Secretary *ad interim* derives his powers solely from the appointment of the President, and the law under which it is made. He may be the chief clerk in the department, or *any other person*, at the discretion of the President. The law, in

broad and unequivocal terms, makes it discretionary with the President to appoint *any person* he may deem fit. Experience has taught us that this discretion may be very judiciously exercised by conferring the appointment on the chief clerk, but the broad terms of the act would fully warrant the President in selecting *any other* person; and it would, moreover, be his duty to do so, if, in his discretion, he should deem it most expedient. It was doubtless considered, when the act of 1792 was passed, that it was expedient to allow to the President an unlimited range of selection, and hence the use of the broad and comprehensive language of that act. It would, indeed, be difficult to suggest any good reason for restricting him to any particular person, or class of persons. But in addition to this consideration, there can be no doubt that, in 1792, chief clerks were not as well qualified, by experience in the business of their respective departments, to perform the duties of the heads of those departments, as they have since become. It may have been because, in the contemplation of Congress, no person would probably be found in office competent to perform the duties of Secretary, in the contingencies provided for by the act of 1792, that the power was conferred on the President to authorize *any* person, at his discretion, to perform them. We consider that the provision, especially at that early day in the history of the federal Constitution, was wise and politic, and the discretion vested in the President one which might safely have been entrusted to him. He is in the daily exercise of higher and much more important powers.

The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk it is so conferred, not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him, and his office of chief clerk is not incompatible with it. He is then in the same condition, in all respects as regards the office of Secretary *ad interim*, as if he did not hold the office of chief clerk. It follows, then, necessarily, that he has two offices—(1) that of chief clerk, and (2) that of Secretary *ad interim*, each separate and distinct from the other. His, therefore, is not the case of an officer to whose office additional duties have been annexed, but that of an officer who, while holding one office, has another distinct and separate from it conferred on him, and the two are not incompatible with each other. Hence he may rightfully hold both, and take the fees and enjoy the emoluments of both.

It was on principles like these that Mr. Chief Justice Taney decided the case of the United States *vs.* White; and it was by virtue of the same or a similar power to that exercised by the President in the appointment of a Secretary *ad interim*, that White, whilst he was navy agent, was appointed a purser *ad interim*. He was not a purser, because a purser, except when a vacancy occurs during the recess of the Senate, can only be appointed by the President, by and with the advice and consent of the Senate, (2 Stat. at Large, p. 699,) and he was appointed by the Secretary of the Navy. He was, in the language of the Chief Justice, "a purser *ad interim*, usually called acting purser," appointed *to perform the duties of purser*. The court say: "The act of Congress fixes the salary of purser, when not otherwise provided for, at $1,500 a year. As the defendant performed all the

duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services. The circumstance that he held the office of navy agent at the same time can make no difference." It seems to us that the analogy between that case and the case of Dickens *vs.* The United States, is perfect and complete.

As regards salaries, the act of Congress applicable to pursers is as follows: "In lieu of the pay, rations, allowances, and other emoluments authorized by existing laws and regulations, the annual pay of pursers shall be as follows, viz: * * *; and at other places, fifteen hundred dollars," (5 Stat. at Large, p. 535;) and the act of Congress applicable to secretaries is as follows: "Instead of the salaries now allowed by law to the following officers, there shall be paid to them, quarterly, the following annual salaries respectively; that is to say: to the Secretary of State, six thousand dollars; to the Secretary of the Treasury, six thousand dollars; * * * *; to the Secretary of the Navy, six thousand dollars; * * * *; and to be paid out of any money in the treasury not otherwise appropriated."—(3 Stat. at Large, p. 484.) In considering the case of Dickens *vs.* The United States, it seemed to us that if, under the former act, White was entitled to the salary of a purser, it followed, as a necessary and inevitable consequence, that, under the latter, Dickens is entitled to the salary of the Secretary of State, and to the salary of the Secretary of the Treasury. As to the point now under consideration, the language of the former is, "the annual pay of pursers," and that of the latter, "the following annual salaries respectively, that is to say: to *the* Secretary of State," &c.; so that, by the one, provision is made for "the annual pay of pursers," and, by the other, for the annual salary of "*the* Secretary of State," &c. It might be urged that "pursers" is a general term, and may, therefore, be construed to include "acting pursers," but that, in the other case, the article "the" restricts the salary to the actual Secretary. But it is obvious that the term "pursers," taken according to its strict literal meaning, is as much restricted to actual pursers as the terms "the Secretary" to the actual Secretary. It is only by enlarging the former beyond its literal meaning that it can be construed to embrace *acting pursers.* It is so enlarged in order to reach the intent and meaning of the law. "It is not the words of the law," says the ancient Plowden, "but the intended sense of it, that makes the law—the letter of the law is the body; the sense and reason of the law is the soul."—(Eyston *vs.* Studd, Plowd., 465.) The law having created the office of acting purser, it is just to presume that it would annex to it an adequate compensation. Hence it is the suggestion both of justice and of right reason, that, in using the term "pursers"—a term broad enough to be extended without violence to *acting pursers*—it meant to embrace them. "Every statute ought to be expounded, not according to the letter, but according to the meaning—*qui hœret in litera, hœret in cortice.*"—(Dwarris, 552.) But the terms "*the Secretary*" may, with equal propriety, be construed to include *the acting Secretary.* An *acting purser* is no more a *purser* than an *acting Secretary* is *Secretary;* and it is no more to be presumed that the law, having created the

office of Secretary *ad interim*, would leave it unprovided with an adequate salary, than that it would leave the office of purser *ad interim* without adequate pay.

The truth is, that statutes like those now under consideration are to be construed liberally, and such a construction is in accordance with sound and well settled principles. A remedial statute may be extended by equity to *other persons* besides those expressly named. The statute of *circumspectè agatis*, &c., in England, names only the bishop of Norwich, but has been always extended, by equitable construction, to other bishops. In Platt's case (Plow., 36) it was said: "It is not unusual, in acts of parliament, especially in the more ancient ones, to comprehend by construction a *generality*, where express mention is made only of a *particular;* the particular instances being taken only as examples of all that want redress in the *kind* whereof the mention is made." Thus the act of Rich. II, chap. 12, orders, that the warden of the fleet shall not permit prisoners in execution to go out of the prison by bail or baston, yet it has been adjudged that the act extends to all gaolers.—(Dwarris on Stat., 617, 618.) In the matter of Briant, clerk of the papers, and clerk of the day-rules in the King's Bench prison, the court held, that though the clause requiring the residence of the marshal did not in terms extend to the other officers, yet, considering the duties of those officers, in whom the public reposed a considerable confidence and trust, &c., &c., it was evident the legislature intended to require the personal residence of those officers, and particularly of this person.—(Ibid., 618; 5 T. R., 509.) And so a statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed.—(Pierce *vs.* Hopper, 1 Str., 253.) Therefore the New River water act was holden, although only the city of London be therein mentioned, to extend to places adjacent; because all statutes made for the convenience of the public ought to have a liberal construction—to be expounded largely, and not with restrictions.—(New River Company *vs.* Graves, 2 Vern. R. 531.) And so in Virginia, a statute naming administrators was extended by construction to executors.—(Sheppard *vs.* Starke, 3 Munf., 29—41.) Instances might be multiplied almost without number.

It seemed to us, therefore, that the case of the United States *vs.* White is not only analogous to the case of Dickens *vs.* The United States, and authority entitled to very high respect, but also that it was well decided, and rests upon sound and correct principles.

The present Attorney General, in a letter dated May 25, A. D., 1855, concerning the diplomatic and consular systems of the United States, says: "Besides which, an officer may lawfully be, and occasionally is, appointed either a statute officer, or other, without any existing provision for his compensation; which, if he be lawfully appointed, creates a valid debt against the government."—(Pamphlet, p. 30.) Mr. Wirt, Attorney General, said: "His salary, as governor, is compensation for his services as governor. But the services for which he claims do not belong to his duty as governor of the Michigan Territory; and having been employed by the government to perform these services, he has a fair claim for them on the principles of a *quantum meruit*. The facts conceded, his right, I think, is undeniable."—(2

Opinions of Attorneys Gen., 189.) And Mr. Legare said: "I am of opinion that the Secretary of the Treasury *ad interim*, appointed by virtue of an express law, has a claim upon the government for the usual, or, if there be no usual, for a reasonable compensation for his services in that capacity; but I do not think he can obtain it without an appropriation by Congress for the purpose. The act of 1839 is imperative to that effect."—(4 Opin. of Attorneys Gen., 122, 123.) And, said Mr. Mason: "So where, in case of vacancy, death, absence from the seat of government, or sickness, the President may authorize another to perform the duties of the Secretary of State, Secretary of the Treasury, or of the Secretary of War, or any officer of either of said departments whose appointment is not in the head thereof. Until a successor be appointed, or such vacancy be filled, it has been the constant practice to appoint an officer receiving a salary; and it seems to be settled that such officer may receive the salary of the office which he is thus temporarily filling, but cannot receive his own at the same time."—(Ibid., p. 465.) We do not cite these opinions as authority, but we refer to them merely to show the practice of the government, and as the opinions of learned lawyers upon this subject. They are sustained by the cases of the United States *vs.* McDaniel, 7 Peters R., 1; the United States *vs.* Ripley, ibid., 18; and the United States *vs.* Fillebrowne, ibid., 28.

But the sounder and more correct view of this subject was, we think, taken by the circuit court of Maryland in the case of the United States *vs.* White. The case now before us, is substantially the same as that of Dickens *vs.* The United States, and depends on the same principles. It must, therefore, be decided in the same way. We shall report a bill in favor of the petitioner for the sum of seven thousand six hundred and twenty-nine dollars and sixty-four cents.

Statement showing the number of days John Boyle performed the duties of Secretary of the Navy.

From the 21st March, A. D. 1831, to the 14th day of April, A. D. 1831, both days inclusive..... 25 days.
From the 12th May, A. D. 1831, to the 23d day of May, A. D. 1831, both days inclusive..... 12 days.
From the 16th day of June, A. D. 1831, to the 23d day of June, A. D. 1831, both days inclusive..... 8 days.
From the 10th day of August, A. D. 1831, to the 20th day of September, A. D. 1831, both days inclusive..... 42 days.
On the 3d day of December, A. D. 1831; on the 6th day of January, A. D. 1832; and on the 19th day of January, A. D. 1832..... 3 days.
From the 11th to the 14th day of August, A. D. 1832, both days inclusive..... 4 days.
From the 3d day of April to the 25th day of May, A. D. 1833, both days inclusive..... 53 days.
From the 11th day of June to the 5th day of July, A. D. 1833, both days inclusive..... 25 days.

From the 3d day of August to the 5th day of September, A. D. 1833, both days inclusive	34 days.
On the 3d, 7th, 10th, 11th, and 31st days of January, A. D. 1834	5 days.
From the 11th day of June to the 13th day of September, A. D. 1834, both days inclusive	95 days.
On the 3d day of December, A. D. 1834, and on the 29th day of January, A. D. 1835	2 days.
From the 7th day of May to the 17th day of June, both days inclusive	42 days.
On the 1st day of July, A. D. 1835	1 day.
From the 6th to the 18th day of July, A. D. 1835, both days inclusive	13 days.
On the 7th day of August and on the 23d and 24th days of October, A. D. 1835, and on the 2d day of February, A. D. 1836	4 days.
From the 13th day of July to the 18th day of August, A. D. 1836, both days inclusive	37 days.
From the 13th day of July to the 31st day of July, A. D. 1837, both days inclusive	19 days.
From the 23d day of October to the 28th day of October, A. D. 1837, both days inclusive	6 days.
From the 23d to the 27th day of July, A. D. 1838, both days inclusive	5 days.
From the 6th day of October to the 5th day of November, A. D. 1838, both days inclusive	31 days.
Total	466 days.

According to the practice of the Treasury Department, of the above, 188 days (if paid for at all) would be paid for at $16 48, per day	$3,098 24
And the remaining 278 days, at $16 30, per day	4,531 40
Total	7,629 64

A BILL for the relief of Cornelius Boyle, administrator of John Boyle, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Cornelius Boyle, administrator of John Boyle, deceased, the sum of seven thousand six hundred and twenty-nine dollars and sixty-four cents, in full for the services of the said John Boyle as Acting Secretary of the Navy at various times between the 21st day of March, 1831, and the 5th day of November, 1838.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 18.

IN SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

FERDINAND COXE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents received from the State Department, and referred to in the opinion of the Court, and transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the Court.
6. Bill for the relief of claimant.

Other documents connected with the case referred by the House of Representatives, and returned to that House in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

Your petitioner, Ferdinand Coxe, of the State of Pennsylvania, respectfully represents, that he was Secretary of Legation of the United States at the imperial court of Brazil in the years 1852 and 1853; that during those years, at two different periods, he was left to act as the chief in charge of the legation there. These periods were from

January 13 to February 10, 1852; and from May 12 to August 18, 1853. On each occasion your petitioner had sole and entire charge of the said legation, Mr. Robert C. Schenck, then envoy extraordinary and minister plenipotentiary of the United States to Brazil, being absent at Buenos Ayres, and other countries on the Rio de la Plata, in South America; and during the last of the times above mentioned your petitioner was regularly presented, under express instructions and authority of the government of the United States as chargé d'affaires *ad interim*, and as such was recognized and received by the government of Brazil. For his official services, at these several times rendered, your petitioner claims and demands from the United States the sum of eight hundred and seventy-one dollars and sixty cents, ($871 60,) that is to say: one hundred and ninety-eight dollars and sixty-five cents ($198 65) for his services in 1852; and six hundred and seventy-two dollars and ninety-five cents ($672 95) for his services in 1853; the said amounts being the difference between his pay as secretary of legation and the pay of a chargé d'affaires, and being the usual and legal compensation allowed and paid in such cases. Your petitioner also claims and demands, in addition to his compensation to which he is entitled as aforesaid, the further sum of four thousand and five hundred dollars ($4,500,) being the amount regularly and legally to be allowed and paid to him for his outfit as said chargé d'affaires of the United States; according to the custom and usage of the State Department and of the government, and the customary appropriations by Congress for persons holding the office of chargé d'affaires.

Your petitioner represents that so much of his said claim as relates to compensation or salary has been heretofore submitted to Congress, and the following proceedings had thereon: His petition being presented at the 1st session of the 33d Congress, in the House of Representatives, was referred to the Cammittee on Foreign Affairs, but not reported or acted on; at the same session, in the Senate, his petition being presented was referred to the Committee of Foreign Relations, who made a favorable report, but the report was not then taken up; at the second session of the 33d Congress, the report of the Committee of Foreign Relations, in the Senate, being taken up, together with an accompanying bill for his relief (No. 480,) the bill was passed and sent to the House of Representatives, but was not acted on or disposed of in that branch of the legislature; but was referred, by resolution of the 3d of March, 1855, to this Court for decision.

Your petitioner states that no part of his said claim has been paid, but the whole remains due and unsatisfied; and the sole and entire interest therein is in himself. And he prays that the same may be adjudged to him by this honorable Court, and that he may have all such relief in the premises as he is justly entitled to.

SCHENCK, CORWIN & WEBB,
Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia. }

Before the undersigned, a justice of the peace in and for the county and State aforesaid, personally came Ferdinand Coxe, the petitioner

above named, and made oath that the facts and statements set forth in the foregoing petition are true to the best of his knowledge and belief. Given under my hand at the said city of Philadelphia this 23d day of November, 1855.

ARMON DAVIS,
Alderman, and ex officio Justice of the Peace.

STATE OF PENNSYLVANIA, }
County of Philadelphia. }

I, James G. Gibson, prothonotary of the court of common pleas of said county, do certify that Armon Davis, before whom the annexed acknowledgment was made, was at the time, and now is an alderman and ex officio justice of the peace of the city of Philadelphia, duly commissioned and qualified to administer oaths and affirmations, and take acknowledgments, &c., and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature thereto is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this twenty-third day of November, A. D. 1855.
[L. S.]

JAMES G. GIBSON,
Prothonotary.
Per E. WARD.

FERDINAND COXE *vs.* THE UNITED STATES.

Plaintiff's brief.

This case presents two claims:

1. For salary due him as chargé d'affaires at Brazil, during the time he so served, or rather the difference between his pay as secretary of legation and the pay due him as chargé during that time.

2. An outfit as chargé.

See petition and account filed—proofs.

The claimant offers and files certified copies from the records of the State Department, showing his appointment and service.—(See proofs with papers.)

First. The first point is—

That the authority to appoint ambassadors, &c., is given to the President of the United States by the Constitution of the United States, and is derived from an act of the national legislature.—(See Const., art. 2, sec. 2, and Mr. Cushing's opinion, filed in the cause passim, and the practice of the government therein detailed.)

This is especially the case with these temporary appointments, such as that of the claimant, which was made under the authority of the Constitution and the usage and customs of nations, to preserve uninterrupted the diplomatic intercourse between nations.—(See Ex. Doc. No. 73, H. of R., 19th Congress, 2d session, Ex. Papers, vol. 5, 1826–'27, p. 7.)

That this power to supply any temporary vacancy in the diplomatic relations of the government, and so preserve uninterrupted our foreign relations, must be vested somewhere, *ex necessitate rei.*

In case of a vacancy occasioned by the death of the minister, the secretary of legation becomes *ipso facto* the government's representative, a state of things arising out of the necessity spoken of. When occasioned by the necessary absence of the minister from his post, the same necessity existing, but in a somewhat different form, that is to say, in a form when the appointing power can be exercised, that power is exercised, and the vacancy filled, as in the case at bar.—(See article 2, sec. 2, Const., in the paragraph next to that constituting the treaty-making power, and Doc. 73, p. 8.)

2. The President has power to fill all vacancies occurring during the recess of the Senate.—(See Const., art. 2., sec. 2.)

3. The claimant presents himself as having been appointed chargé d'affaires, under the order of the government, during the absence (by order) of the minister from his post, and during the recess of the Senate. He was, therefore, as regularly appointed as if he had been nominated to the Senate and confirmed by that body.

Second. The second point is—

That, having been so appointed, he is entitled to all the compensation belonging to the office so filled by him, to wit: 1. The salary; 2. The outfit.

1. Having been regularly appointed to the office, and filled the duties appertaining to it, and performed the services required by it, there must be authority somewhere to pay him, there being, beyond all question, an implied agreement on the part of the government to pay for the services of her employés.

In this connexion, Mr. Cushing says, in the opinion alluded to, at page 30: "Besides which, an officer may lawfully be, and occasionally is, appointed either a statute officer or other, without any existing provision for his compensation, *which, if he be lawfully appointed, creates a valid debt against the government.*"

From the very nature of the case, no special provision was made for these appointments, so uncertain and contingent in their character.

2. It is therefore contended that the debt created against the government, the compensation belonging to such appointments, embraces all of the allowances and emoluments belonging to the original office, that is to say, to chargé des affaires.

Third. The plaintiff's third point is—

That the allowances to chargé des affaires are: 1. A salary of $4,500 a year; 2. An outfit equal to one year's salary; and in support of this view, he refers:

1. To the general acts of Congress on this subject;

2. To the usage of the State Department acting under these laws;

3. To the special legislation of Congress in like cases.—(See for general laws of Congress, Statutes at Large, vol. 1, 128, 299, 345, 487, 541; vol. 2 of do., 78, 608.)

The language of these laws down to the act of May 10, 1810, is uniformly, "that exclusive of an outfit," amounting to a year's full salary, "the President *shall not allow*, as a compensation, a greater *sum than $4,500 to chargé* des affaires," &c.

The law thus fixing the standard, and requiring that it *shall not* be extended in any case, and that standard of compensation is expressly the outfit and the salary of $4,500.

The act of 1810, (vol. 2, Statutes at Large, 608,) does not change the legislation upon this subject by placing the outfit in the proviso to the first section, "the construction which has been put in uniform and concensured practice on this proviso is, that it was merely introduced to authorize the outfit which had been omitted in the previous part of the section."—(Mr. Wirt's opinion, October 14, 1823, opinions Attorney General, 469.)

This act of 1810 relates entirely to new, or in other words original appointments, and has no reference to such temporary appointments as that under consideration. The second section of the act confirms the power of the President to appoint the officers mentioned during a recess of the Senate, and excepts such appointees from the other parts of the section, the language being "but the President (in the recess of the Senate) is authorized to make such appointments which shall be submitted to the Senate at the next session thereafter, for their advice and consent."

Here is the power of appointment; and so far as the power of appointing and the party appointed is concerned, it is completed, the advising or confirming power not being in a position to take any part in that appointment. The act authorizes such appointments, and enacts that parties so appointed shall receive the compensation therein provided.

In this case the appointment was made and it terminated during a recess of the Senate. The power to make such appointment is no denied, and it cannot be the spirit of our laws that officers shall be appointed and not paid for what they do under that appointment, and that, too, when the advice and consent of the Senate cannot be obtained or even asked.

2. For usage of the department under the laws in question, see Mr. Clay's report, Doc. 73, passim; Ex. Doc., No. 12, 30th Congress, 1st session; see also Mr. Cushing's opinion among papers.

3. For the special legislation of Congress, claimant would refer to the acts of Congress in such cases, extending through the whole series of the Statutes at Large, and would give references only for the purpose of selecting a few individuals from what is a large class of cases, to the following: Statutes at Large, vol. 3, 501; vol. 4, 625, 626; vol. 5, 763; vol. 6, 667; "Act for the relief of John R. Clay, *et al.*;" vol. 9, 166, 300, 343, 369; vol. 10, 89, 203, and 135.

The act of March 1, 1855; 10 Statutes at Large, 619, sec. 26; section on page 626 abolishes outfits, &c.; but this act makes no provisions for chargés.—(See Mr. Cushing's opinion as to the effect of this act.)

The act of August 18, 1856, regulates the pay of all diplomatic officers, making that of chargé des affaires fifty per centum of that of ministers, and increasing the compensation to ministers, and in section 10 provides for just such cases as that of this claimant, showing the spirit of legislation on this subject to be, that the temporary appointee is to have one-half, or fifty per centum of the allowances belonging to the principal officer.

IN THE COURT OF CLAIMS.

ON THE PETITION OF FERDINAND COX.

Brief of the United States Solicitor.

The claim is, 1st, for pay as chargé *ad interim* at Brazil, whilst Mr. Schenck was absent; and, 2d, for an outfit.

With respect to the outfit, the 1st section of the act of 1810, (2 Stat., p. 608,) has a proviso which limits the outfit to the amount of one year's salary to a minister *on going out of the United States*. This expresses what the word *outfit* implies in itself—that outfits are paid only to those ministers who are sent out of the United States. In this case the claimant was at the time of entering on his duties already in Brazil, as secretary of legation, and the letter of the Secretary of State which authorizes him to act as chargé *ad interim* recognizes this fact.

But this, as well as the claim for compensation, is disposed of by the second section of the act of 1810, which provides that no compensation shall be paid to those who may be appointed to such an office unless the appointment shall be submitted to the Senate and ratified by that branch of the government. Coxe's appointment was not approved by the Senate, and, therefore, he has no right to compensation—payment is positively prohibited by the act.

The mere filling of an office or rendition of service does not of itself entitle an officer to compensation. It is analogous to a fiduciary relation, in which the fiduciary does not entitle himself to pay at all unless by an express agreement; and unless the law expressly annexes to the performance of certain duties the right to compensation in money no such right is created.

In Dickens' case, the law expressly annexed to the offices which he filled a certain compensation, and he became entitled to the emoluments by becoming vested with the powers, and by discharging the duties of the stations. The circumstance that he was merely *acting* Secretary of State did not in the least take from his power as Secretary. His acts had all the legal force of any other Secretary, and although he may not in fact have done as much and been called to cabinet councils, &c.; that is a circumstance of which a court could not take notice. He might have been called to consultation, and have done more than other Secretaries in that and other ways. He might have been one of the leading statesmen of the day, as such Secretaries *ad interim* often were. Mr. Monroe, and Mr. Butler, and others, who at different times filled at the same time two places in the cabinet, and received compensation as well for the duties which they discharged as Secretary *ad interim* as for the ordinary duties, where the most prominent politicians of the day, but had no greater legal power or responsibility than Mr. Dickens whilst acting Secretary *ad interim*, and were not a whit better entitled to the compensation.

But these are cases unlike the present, in the fact that the law which provides for making such appointments as they filled, did not require that these appointments should be submitted to the Senate and confirmed as a condition precedent to the payment of any compensation.

M. BLAIR, *U. S. Solicitor.*

IN THE COURT OF CLAIMS.

FERDINAND COXE *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner states the following case: He was secretary of legation of the United States at Brazil in the years 1852 and 1853; and during those years, at two different periods, he was left to act as the chief in charge of the legation there. These periods were from January 13 to February 10, A. D. 1852; and from May 12 to August 18, A. D. 1853. On each occasion the petitioner had sole and entire charge of the legation, the minister being absent at Buenos Ayres and other countries on the Rio de la Plata, in South America, and during the last of the times above mentioned the petitioner was regularly presented, under express instructions and authority of the government of the United States, as chargé d'affaires *ad interim*, and as such was recognized and received at Brazil.

For his official services at these several times rendered, the petitioner claims $871 60; *i. e.* $198 65 for his services in 1852, and $672 95 for his services in 1853; these amounts being the difference between his pay as secretary of legation and the pay of a chargé d'affaires, and the usual and legal compensation allowed in such cases. The petitioner also claims the further sum of $4,500, being the amount regularly and legally to be allowed and paid him for his outfit as chargé d'affaires, according to the custom and usage of the State Department and of the government, and the customary appropriations by Congress for persons holding the office of chargé d'affaires.

So much of the petitioner's claim as relates to compensation or salary has been heretofore submitted to Congress, and certain proceedings had thereon, which are stated in the petition.

The Secretary of State, in a letter to the chairman of the Committee on Foreign Affairs, in the House of Representatives, dated February 9, A. D. 1854, states as follows: "I have the honor to acknowledge the receipt of your letter of the 8th instant, with its enclosures, relating to Mr. Ferdinand Coxe's claim for compensation as chargé d'affaires of the United States, near the government of Brazil, during the absence of Mr. Schenck, at different times, during portions of the years 1852 and 1853.

"During his first absence, say from about the 10th of January to the 11th February, 1852, which absence was for his own recreation, Mr. Schenck left the legation in charge of Mr. Coxe, but without announcing him officially as chargé; and it does not appear that Mr. Coxe was required to perform diplomatic duties during the period mentioned.

"Mr. Schenck's second absence extended from the 12th May to the 16th August, 1853, and during this time Mr. Coxe, by authority of this department, was charged with the duties of the legation, was recognized by the Brazilian government as chargé d'affaires *ad interim*, and in that character rendered such services to the interests of the

United States as entitled him, in the estimation of this department, to suitable compensation."

The first section of the act of Congress, approved May 1, A. D. 1810, provides "that the President of the United States shall not allow to any * * * * * chargé d'affaires a greater sum than at the rate of four thousand five hundred dollars per annum, as a compensation for all his personal services and expenses: * * * * * *Provided,* It shall be lawful for the President of the United States to allow to a minister plenipotentiary or chargé d'affaires, on going from the United States to any foreign country, an outfit, which shall in no case exceed one year's full salary of such minister or chargé d'affaires." * * *

The second section of that act provides as follows: "That to entitle any chargé d'affaires * * * * to the compensation hereinbefore provided, they shall respectively be appointed by the President of the United States, by and with the advice and consent of the Senate; but in the recess of the Senate the President is hereby authorized to make such appointments, which shall be submitted to the Senate at the next session thereafter, for their advice and consent; and no compensation shall be allowed to any chargé d'affaires * * * * * who shall not be appointed as aforesaid."—(2 Stat. at L., p. 608-9, ch. 44.)

There can be no doubt, we think, that during the interval between the 12th day of May and the 16th day of August, A. D. 1853, the petitioner was lawfully invested with the office of chargé d'affaires. On the 29th day of April, A. D. 1852, the Secretary of State instructed Mr. Schneck as follows: "It is presumed your absence from Rio de Janeiro need not be prolonged beyond —— months. You will present Mr. Coxe as chargé d'affaires *ad interim* during that time." This was an appointment by the President; for this act of the Secretary was, in contemplation of law, the act of the President. On the 12th day of May, A. D. 1853, the petitioner was formally presented by Mr. Schenck to the imperial court at Brazil as chargé d'affaires *ad interim* during his absence. On the 16th day of August, A. D. 1853, Mr. Schenck resumed his duties. But on the first occasion the minister's "absence was for his own recreation;" and although the petitioner was left in charge of the legation he was not appointed chargé by the President.

The act of Congress, to which we have referred, was in force when the services, for which compensation is claimed, were rendered. Under it the salary of a chargé d'affaires depended upon the discretion of the President, subject to the limitation therein prescribed. The outfit of a chargé was also subject to the President's discretion, except that it could in no case exceed one year's full salary.

The petitioner is not entitled to the salary of a chargé during the period of Mr. Schenck's first absence, because he did not then hold the office of chargé under the appointment of the President. Nor is he entitled to an outfit, because it could only be allowed to a chargé "on going from the United States to any foreign country." But, in addition to these objections to these two items of his claim, the President did not *allow* him any salary for his services as chargé during Mr. Schenck's first absence, or any outfit on either occasion; and it

must be presumed, that he failed to make such allowance, because, in his opinion, none was due to the petitioner. We have seen that both these matters rested in the discretion of the President, and his action in regard to them was conclusive.

In regard to the services of the petitioner as chargé d'affaires during the minister's second absence, the President has, through the Secretary of State, declared that, in his estimation, the petitioner is entitled to suitable compensation. This, we think, is conclusive in the petitioner's favor. It only remains to determine what is suitable compensation. We are of the opinion that the petitioner's claim in this respect is reasonable, and that he ought to receive therefor the difference between his salary as secretary of legation and the full salary of a chargé d'affaires from the 12th day of May, A. D. 1853, till the 16th day of August, A. D. 1853, both days inclusive.

We shall report to Congress a bill in favor of the petitioner for the sum of six hundred and sixty-two dollars and sixty-nine cents.

A BILL for the relief of Ferdinand Coxe.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is directed, out of any money in the treasury not otherwise appropriated, to pay to Ferdinand Coxe the sum of six hundred and sixty-two dollars and sixty-nine cents, being in full for his salary as chargé d'affaires at the court of Brazil, from the 12th day of May, 1853, to the 16th day of August, 1853, inclusive, the said sum being the difference between said Coxe's salary as secretary of legation and the full salary of chargé d'affaires.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 19.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER, 18, 1857.—Referred to the Committee on Claims.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES Mc. McINTOSH *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief or argument, and supplemental argument.
3. Report of Fourth Auditor, referred to in the opinion of the Court, transmitted to the House of Representatives.
4. Opinion of the Court.
5. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

TO THE COURT OF CLAIMS.

The Petition of James Mc. McIntosh, a captain in the navy of the United States, respectfully represents:

That on the fourteenth day of August, in the year one thousand eight hundred and thirty-seven, being of the rank of a lieutenant, in command of the United States schooner Grampus, one of the vessels

composing the West India squadron, under the command of Captain Alexander J. Dallas, lying at Pensacola bay, he received an order from the said Captain Dallas, commander-in-chief of the squadron, in the words and figures following:

"UNITED STATES FRIGATE CONSTELLATION,
"*Pensacola Bay*, 14*th August*, 1837.

"SIR: You are hereby appointed 'flag captain' of the squadron under my command, and will repair on board of the United States frigate Constellation forthwith, and assume the duties of that station. You will receive the pay of a commander.

"Respectfully, your obedient servant,

"A. J. DALLAS.

"Lieutenant Commanding JAMES Mc. McINTOSH,
United States Schooner Grampus."

Your petitioner further represents that, in obedience to the said order, he forthwith assumed the duties of flag captain of the squadron, and continued faithfully to discharge the same until the second day of September, in the year one thousand eight hundred and thirty-eight, a period of one year and nineteen days, when the flag of the squadron was transferred to the sloop-of-war Vandalia, and the frigate Constellation ordered to the naval station at Boston for repairs, under the command of your petitioner, when your petitioner was detached from her by an order of the Secretary of the Navy.

Your petitioner further represents that, on assuming the duties of flag captain, the officers and crew of the frigate Constellation were mustered, and the appointment of your petitioner was read to them by order of the commander-in-chief, who thereupon issued a circular, and addressed to the commanders of the respective vessels of the squadron, directing that all reports relating to the duties of the squadron should thereafter pass through your petitioner, as flag captain; and that, although styled "flag captain," (which title was not recognized by the Fourth Auditor,) he was, in all respects, captain of the ship; and your petitioner, also, by direction of the commander-in-chief, occupied the cabin of the Constellation with himself.

That, during the whole of the period your petitioner was attached to the Constellation, as flag captain of the squadron, orders were issued signed by him as flag captain; he was gazetted as flag captain in the Army and Navy Chronicle, published at the city of Washington; and some of the orders signed by him as flag captain, which were communicated to the Navy Department, became the subject of correspondence between the Secretary of the Navy and your petitioner.

That no objection was made to the appointment of your petitioner until after he had been thus employed more than two months, when a letter was received from the commander-in-chief from the honorable the Secretary of the Navy, dated the 14th of October, 1837, stating that he regretted he had not the power to make the appointment of "acting commander." That the commander-in-chief, believing the Secretary of the Navy to be under a misapprehension of the character of your petitioner's appointment, replied to that letter, stating that he

had not conferred on your petitioner the appointment of acting commander, but that of flag captain of the squadron, and referred him to a book of regulations which had been placed in his hands by the Navy Department when appointed to the command of the squadron, as his authority for appointing a flag captain. That, a long time having elapsed without receiving an answer to that letter of explanation, the commander-in-chief, on the 22d of December, 1837, addressed another letter to the honorable the Secretary of the Navy, requesting to be informed of the determination of the department in relation to your petitioner's appointment, communicating therewith a copy of his former letter; to which the *Acting* Secretary replied, stating that the Secretary of the Navy had already disapproved of your petitioner's appointment—referring, as your petitioner believes, to the letter of the Secretary of the Navy of 14th of October, 1837, wherein he disapproved of an appointment which was supposed to be an "acting commander," but did not disapprove of the appointment of flag captain, which the Secretary had the authority to sanction.

Your petitioner further represents, that the commander-in-chief, not regarding the letter of the Secretary of the Navy as disapproving the appointment of flag captain, notwithstanding the letter of the Acting Secretary, continued your petitioner in that station. That nothing occurred on the subject of your petitioner's appointment until a further period of two months had elapsed, when, in consequence of a note made by the commander-in-chief on the monthly pay-roll, opposite to the name of your petitioner, a letter was received from the Secretary of the Navy, dated 5th of January, 1838, informing the commander-in-chief that your petitioner was regarded by the department, and would be paid, as a lieutenant commanding

Your petitioner further represents that, soon after the receipt of the last mentioned letter, a commander's commission was issued to and received by him, on board of the said frigate, enclosed in a letter of which the following is a copy:

"NAVY DEPARTMENT,
"*March* 13, 1838.

"SIR: The President of the United States, by and with the advice and consent of the Senate, having appointed you a commander in the navy, from the 28th day of February, 1838, I have the pleasure to enclose herewith your commission, dated 9th March, 1838, and numbered five.

"I am, respectfully, your obedient servant,

"M. DICKINSON.

"Commander JAMES Mc. McINTOSH,
United States Frigate Constellation, Pensacola."

Your petitioner further represents that, as soon as he received the said commission, the commander-in-chief advised the Secretary of the Navy that your petitioner would be continued as flag captain, to assist in the discharge of the duties of the squadron; and your petitioner was so employed until the 2d of September, 1838, when the frigate proceeded to Boston as aforesaid.

That at the time your petitioner was appointed flag captain, he was

recommended by the surgeon of the Grampus and the fleet surgeon, to return to the north for the restoration of his health, which had become much impaired by long service in a tropical climate; and he was only induced to remain, influenced by the representations of his commander of the importance of his services, and to enjoy the advantages resulting from the honorable station to which he had been advanced.

That the squadron commanded by Commodore Dallas, during the principal part of the time your petitioner served as flag captain, consisted of one frigate, six sloops-of-war, one schooner, three revenue cutters, and three steamers, and the appointment of your petitioner was required in consequence of the arduous and increased duties which devolved on the commander-in-chief, arising from the nature of the service and peculiar circumstances connected with it, and which, unassisted, he was unable to discharge, as he advised the Secretary of the Navy at the time your petitioner's appointment was made. The multiplied duties of the commander-in-chief arose from the increasing of the squadron—his co-operation with the army engaged in the Florida war, the protection of American commerce, at that period much exposed from the contest between Texas and Mexico, and the blockading of the ports of the latter power by a French squadron.

That, simultaneously with detaching your petitioner from the command of the Grampus, by the order of the 14th of August, 1837, Lieutenant Engle was appointed by the commander-in-chief to succeed to that command; and the appointment of Lieutenant Engle was immediately sanctioned by the Secretary of the Navy, as will appear by the records of the department, about the date of September, 1837.

Your petitioner further represents that, about six weeks after his appointment as flag captain had been made and reported to the Secretary of the Navy, and after the appointment of his successor to the Grampus had been confirmed, and no direction having been given by the department in regard to your petitioner, relying on the authority of the commander-in-chief to make the appointment, and confident of its approval from the length of time that had elapsed without objection, he directed his family to be removed from the city of New York to Pensacola, where they, at great expense and inconvenience, joined him during the early part of the then next month of November.

That, during the whole of the time your petitioner was attached to the squadron as flag captain, there was no officer on board the frigate superior to himself but the commander-in-chief. That the frigate, during that time, performed a voyage to Tampico with the commander-in-chief and your petitioner on board; and that, in every particular, your petitioner performed the duties of *captain* of the ship, *issuing the customary orders, and being considered as such by all on board;* and during the residue of the period the frigate remained at Pensacola bay, known and recognized as being within the limits of the West India station, and the usual place of rendezvous of the squadron attached to that station for supplies and repairs.

That, at different periods during the time your petitioner was discharging the duties of flag captain, four sloops-of-war attached to the

squadron were commanded by lieutenants junior to himself, viz: the Boston, commanded by Lieutenant Engle; the St. Louis, commanded by Lieutenant Ward; the Erie, commanded by Lieutenant Farragut: and the Concord, commanded by Lieutent Adams; all of whom received the pay allowed by law to commanders attached to vessels for sea service, at the rate of $2,500, while to your petitioner, commanding a frigate, there was allowed before his promotion only at the rate of $1,800 per annum, and after promotion only at the rate of $2,100, the latter being the pay of commanders or masters commandant, "on other duty," by the first section of the act approved March 3, 1835, in the following words: "when attached to navy yards, or on other duty, $2,100;" a provision of the same act declaring that commanders shall receive $2,500 when attached to vessels for "*sea service.*" One ration was also allowed to your petitioner both as a lieutenant and as a commander.

That he preferred this his claim to the Fourth Auditor, for the pay for performing duties belonging to a grade higher than his own, by virtue of a clause in the first section of the act of Congress, approved 3d March, 1835, chap. 27, entitled "An act to regulate the pay of the navy of the United States." (St. at Large, vol. 4, p. 756,) and which clause reads as follows: "Officers temporarily performing the duties belonging to those of a higher grade, shall receive the same compensation allowed to such higher grade while actually so employed;" but it was disallowed by him in letter of October 13, 1838, which reads as follows:

"TREASURY DEPARTMENT,
"*Fourth Auditor's Office, October* 13, 1838.

"SIR: A letter was received at this office a few days since from the Secretary of the Navy, stating that he enclosed the papers in your case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to was an order from Commodore Dallas, dated August 14, 1837, appointing you flag captain of the squadron under his command, and the other was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as flag captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the department. To this note I have received the following reply: 'In reply to your letter of yesterday's date, I have to state, that the appointment of Commander J. Mc. McIntosh by Commodore Dallas to be flag captain was not sanctioned by the Secretary of the Navy, nor is such an officer as flag captain of any vessel of-war recognized or provided for, either by the old or the new table of complements of the different classes of vessels of the United States navy.' I need hardly say, that it is not in my power to allow you an increase of pay upon the ground of an appointment which thus appears to have been made without sufficient authority.

"I am, sir, very respectfully, your obedient servant,
"A. O. DAYTON.

"Commander J. Mc. McINTOSH,
"*United States frigate Constellation.*"

Your petitioner further represents that, though the squadron commanded by Commodore Dallas was not composed of six frigates, it was one of the largest squadrons ever commanded by any officer of the United States navy; mounting, in the aggregate, as many guns as if it had been composed of that number of frigates, as appears from a letter from Commodore Dallas to the Secretary of the Navy, to which your petitioner prays reference may be had; and he respectfully submits, that the spirit of the navy regulations was not transgressed in his appointment.

Your petitioner further represents, that it is not unusual to appoint flag captains to squadrons composed of less than six frigates, as in the case of the Mediterranean squadron, flag-ship the Congress, *Commodore* Breese, *Captain* Craven, and FLEET CAPTAIN Magruder; also, flag-ship Cumberland, (recently returned from that station,) *Commodore* Stringham, *Captain* Harwood, and *Fleet Captain* Morris; and it is now the practice in almost every case, as see the Pacific squadron, *Commodore* Mervin, *Captain* Tatnall, and *Fleet Captain* Nicholson; and *neither of the above mentioned squadrons were, in point of number of guns or vessels, equal to, or to be compared with, that of Commodore Dallas;* and no subsequent law has been enacted by Congress, or regulation published by the department for such appointments, and yet they are made in every squadron, no matter how small the force.

Your petitioner further represents that, on the 12th of October, 1840, the Hon. James K. Paulding, then Secretary of the Navy, allowed the claim to pay as flag captain, in a letter to the Fourth Auditor, in the following words: "The claim of Commander Mc. McIntosh, for pay as flag captain while serving in that capacity on board the Constellation, under the appointment of Commodore Dallas, has again been brought to the notice of the department; that the department had lately disallowed this claim on the ground that, in the opinion of the accounting officers of the treasury, it could not legally be done; *but that it appearing that there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the department, the claim* (for the pay of flag captain of the Constellation, from the 14th of August, 1837, to the 3d of September, 1838,) *is allowed.*"

Your petitioner further represents, that on the 19th of October, 1840, the Fourth Auditor answered that letter, stating that the allowance of his pay *was in fact against law*, and it was accordingly refused. And, as a further evidence that your petitioner was improperly and insufficiently paid, he represents that, while performing the duties of flag captain, as aforesaid, *he was allowed a ration,* which was an *incontestible proof*, and *an acknowledgment by the department that he was attached to a vessel for sea service*, and yet he was only *paid "as on shore or other duty;"* whereas *rations are never allowed except for sea service.*

Failing to obtain justice from the accounting officers of the treasury, your petitioner resorted to Congress by a memorial, which was presented in the House of Representatives at the 1st session of the 26th Congress, and was referred to the Committee on Naval Affairs; but no report was made thereon at that session. At the 2d session of the

same Congress, said memorial was presented in the Senate, referred to the Committee on Naval Affairs, and the committee discharged. At the 2d session of the 27th Congress it was presented, both in the Senate and House of Representatives, and referred to the appropriate committees; but no action was had thereon. At the 1st session of the 28th Congress it was again presented to both Houses of Congress, and referred as before. In the Senate the committee made a favorable report, (68,) accompanied by a bill, (64,) which passed the Senate; but the Committee on Naval Affairs of the House of Representatives reported adversely, and the Senate bill was laid upon the table. At the 1st session of the 29th Congress it was again presented to both Houses. No action was had by the committee in the Senate; but the Committee on Naval Affairs in the House of Representatives reported favorably, (R. 703, B. 478,) which was referred to the Committee of the Whole House, and no further action was had. At the 2d session of the 29th Congress the Senate Committee on Naval Affairs reported favorably, (R. 76, B. 102,) and the bill passed the Senate, went to the House, and was referred to the Committee on Naval Affairs, who, on February 24, 1847, reported back the Senate bill with an amendment, and the bill was referred to the Committee of the Whole, and no further action was had thereon. At the 1st session of the 30th Congress the Senate Committee on Naval Affairs reported a bill, (245,) but no further action was had.

Your petitioner therefore prays that the decision of Mr. Secretary Paulding, of the 12th of October, 1840, may be carried into effect, and your petitioner be allowed the pay of captain from the 14th of August, 1837, to the 3d of September, 1838, deducting such amounts of pay as he has already received.

STATE OF NEW YORK, }
County of ———. }

Personally appeared James Mc. McIntosh, who, being duly sworn, declares the facts set forth in the forgoing petition to be true, to the best of his knowledge and belief.

IN THE UNITED STATES COURT OF CLAIMS.

CAPTAIN JAMES Mc. McINTOSH, U. S. N., *vs.* THE UNITED STATES.

Argument.

We beg to submit the following examination of the objections assigned by the accounting officers of the treasuary in rejecting this claim, as will be seen by reference to the letters annexed hereto, and others on file in the Navy Department.

"TREASURY DEPARTMENT,
"*Fourth Auditor's Office, August* 14, 1839.

"SIR: In the settlement of the account of John D. Bree, purser of the frigate Constellation, you have been charged on the books of this

office with two hundred and four dollars and ninety-five cents, the difference between the pay of commander on '*sea service*,' as paid by the purser from the 28th February to 2d September, 1838, and the pay of the same grade for the same time '*on other duty*,' as allowed at this office. There is one dollar standing to your credit for balance of pay from 1st August to 15th September, 1827, which leaves due from you $203 95.* I have, therefore, to request your early attention to the subject, otherwise the purser at Pensacola will be directed to check it from your pay.

"I am, sir, respectfully, your obedient servant,

"A. O. DAYTON.

"Commander JAMES MC. MCINTOSH,
"*United States Navy, Pensacola.*"

By the preceding letter it appears that claimant was charged at the Treasury Department with $204 95, being the difference of pay of commander "*on sea service*," paid by the purser, and the pay of the same grade "*on other duty*," allowed on the settlement of his accounts. Relating to this subject, the act entitled "An act to regulate the pay of the navy of the United States," approved March 3, 1835, contains the following provisions:

"Commanders or masters commanding," "when attached to vessels *for sea service*, $2,500;" "when attached to navy yards, *or on other duty*, $2,100;" "one ration per day only shall be allowed to all officers *when attached to vessels for sea service*."

During the period embraced between the 28th of February and 3d September, 1838, claimant held a commander's commission; and, though attached to the flag-ship of a foreign squadron in actual service, and performing in her a voyage to sea, was refused the pay appointed by the act for a commander attached to a vessel "*for sea service*," and allowed that only of a commander "*on other duty*;" thus pronounced by the Auditor to be "on other duty;" in effect, not attached to the frigate Constellation, though, also, his accounts were kept by the purser of that ship.

The decision is not extraordinary, alone, from the clear and explicit terms of the act, that a commander attached to a vessel for "sea service" shall receive $2,500 per annum, but from the anomaly it presents in allowing the *sea ration*, besides the pay of $2,100 "on other duty;" virtually thereby admitting that claimant was "attached to a vessel for sea service," as the ration, by the express language of the act, belongs only to officers "attached to vessels for sea service." The allowance of the ration establishes the *nature* of the employment; it must be received as evidence that he was attached to a vessel for "sea service," and places him within the first branch of the commander's pay-bill; in other words, entitles him to the pay of $2,500 per annum.

Test the Auditor's decision by the provision of the act under which he allows claimant at the rate of $2,100 per annum, and it will be found equally erroneous, viz: Commanders, "when attached to navy

* "$203 95 was paid to Purser White on the 18th August, 1839."

yards, or *on other duty*, $2,100;" by that employment he was not allowed the ration, as "sea service" is essential to that allowance, the act declaring the officer entitled to the ration is he only who is attached to a vessel for "sea service."

By what reasoning the Auditor arrived at his decision we cannot conjecture, unless on the assumption that Commodore Dallas, having transcended his powers, the order was void, and did not operate to attach claimant to a vessel "for sea service."

First. We contend that the Auditor is estopped from taking that exception, as the allowance of the ration, with the approbation of the Navy Department, sanctions the appointment so far forth as to attach claimant to the ship.

Second. The Secretary of the Navy, by letter of the 5th of January, 1838, (five months after the date of claimant's orders to the Constellation,) stated that he was regarded as lieutenant commanding; thereby recognizing him, before his promotion, to be attached to that vessel. Not having been detached after the promotion, but continued in the discharge of the same duties as before, of which the Secretary had notice, it cannot be said that the order of Commodore Dallas did not attach him to the Constellation, whatever may be the effect of the alleged original absence of authority, as it regarded the particular appointment of flag captain hereafter to be considered.

The order of Commodore Dallas relieved claimant from the command of the Grampus, and placed him somewhere; we contend, attached him to the Constellation, as the order appoints; the Auditor thinks it put him "on other duty."

The confirmation of claimant's successor's appointment to the Grampus, without any provision or direction by the department affecting claimant, confirmed him, by implication, in the station to which the Secretary was advised the commander-in-chief had assigned him, and precludes the Auditor from denying (if irregular) "*ab initio*" that the irregularity was not cured by subsequent sanction. Either claimant was attached to a vessel "for sea service," entitled to pay at the rate of $2,500 and a ration, and consequently, the sum of $204 95 was erroneously disallowed, or he was "on other duty," and had no claim to the ration.

The objections to the claim for pay as flag captain from the 14th of August, 1837, to the 3d of September, 1838, will next be considered, reviewing more particularly the letters annexed from the Auditor to Mr. Paulding, respectively dated November 15, 1838, and October 19, 1840, and one to claimant of prior date, October 13, 1838, those letters treating the subject most at large.

"TREASURY DEPARTMENT,
"*Fourth Auditor's Office, October* 13, 1838.

"SIR: A letter was received at this office a few days since from the Secretary of the Navy, stating that he enclosed the papers in your case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to was an order from Commodore Dallas, dated August 14, 1837, appointing you flag captain of the squadron under his command, and the other

was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as flag captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the department. To this note I have received the following reply: 'In reply to your letter of yesterday's date, I have to state, that the appointment of Commander J. Mc. McIntosh by Commodore Dallas, to be flag captain, was *not* sanctioned by the Secretary of the Navy, *nor is such an officer as flag captain of any vessel of war recognized or provided for, either by the old or new table of complements of the different classes of vessels of the United States navy.*' I need hardly say that it is not in my power to allow you an increase of pay, upon the ground of an appointment *which thus appears to have been made without sufficient authority.*

"I am, sir, respectfully, your obedient servant,

"A. O. DAYTON.

"Commander J. Mc. McINTOSH,
"*United States frigate Constellation*".

From the context of the preceding letter, the expression, "an appointment which *thus appears* to have been made *without sufficient authority*," has a double aspect; the Auditor's inquiry was, whether the appointment had been sanctioned, and the *Acting* Secretary replied that it was *not* sanctioned. The want of "sufficient authority," therefore, was, that the appointment "was not sanctioned." It also embraces the other objection presented by the Acting Secretary, that such an officer "as flag captain of any vessel of war *was not recognized or provided for*, either by the *old* or *new* table of complements of the different classes of vessels of the United States navy."

The Auditor, in saying "it *thus* appears," refers to all the reasons against allowing the claim, which *appeared* in his letter antecedent to that conclusion, and he adopts both objections assigned by the Acting Secretary, to wit, as well *that the grade of flag captain was not recognized*, as that claimant's particular appointment had not been sanctioned.

It is proper, first, to ascertain whether the objection second in order, in the Auditor's letter, is well taken, as it clearly follows, if the grade of flag captain was not recognized, the question of sanction becomes entirely unimportant.

In stating that such officer as "flag captain of any *vessel of war*" was not recognized, the Acting Secretary doubtless intended to be understood that such officer as flag captain *of a squadron* was not recognized, else the answer is not responsive to the inquiry, the subject of which was the appointment of flag captain of the *squadron* under the command of Commodore Dallas, as expressed in the order set forth in the first page of the memorial.

Usage in the naval service, though affording abundant evidence, need not be resorted to to establish the extraordinary error of the Acting Secretary, in saying that the grade of flag captain was not recognized, when the regulations are so explicit. We refer to the Red Book, chap. 37, adopted by Mr. Secretary Woodbury, now repealed.

"SECTION 1. Every commander of a squadron, upon a foreign sta-

tion, is authorized to appoint a *flag captain*, or to *select any officer* to perform the duties, under the sanction of the Secretary of the Navy. The appointment without sanction is prohibited."

That regulation disposes of the Acting Secretary's objection, so far as regards the *old* table of complements.

The Auditor approves the view of the Acting Secretary, that the grade was not recognized, not alone by adopting it as the ground of his decision, but in his letter to the Secretary of the Navy of the 19th of October, 1840, makes it the turning point of this case; he says: "The case turns upon the single question of fact, whether he (claimant) performed, during the period in question, the duties of a grade superior to his own. He alleges that he performed the duties of flag captain on board of the Constellation, the principal vessel of the West India squadron. *The first thing necessary to make out his case, was to show that there was such a grade*, for if it did not exist, he could not have performed the duties pertaining to it. *Now he not only failed to show that there was such a grade, but the Acting Secretary of the Navy expressly informed claimant that it did not exist*, and the regulations of the navy declared it could not exist in a squadron of the force of that commanded by Commodore Dallas."

There is an inconsistency in the Auditor's views; he says, claimant not only failed to show that there was such a grade, but the Acting Secretary expressly informed him that it did not exist, *arguendo* assuming, that as there was no such grade, he did not perform the duties pertaining to it; in support of that view, quoting the Acting Secretary as authority; yet, in the next passage, he admits the existence of the grade, under certain circumstances, and thus destroys the authority of the Acting Secretary, who broadly, without limitation or qualification, asserts that "such an officer as flag captain of any vessel of war was not recognized or provided for, either by the *old* or *new* table of complements of the different classes of vessels of the United States."

That the old regulations recognized and provided for a flag captain, appears from the regulation above quoted, and establishes the little reliance to be reposed in the Acting Secretary's knowledge of the subject, who seems to place the propriety of rejecting this claim more on the ground that there was no such grade than that the appointment had not been sanctioned, the non-existence of the grade being the gist of his letter.

That the accuracy of the Acting Secretary is not wholly to be relied on, the regulation adopted on the 20th of January, 1838, is also referred to:

"The following persons may also be borne, in addition to the complement of vessels in which the commander of a squadron is borne, namely, a *captain of a fleet when authorized* by the *regulations* of the navy," &c.

The regulations therein referred to require that the squadron should be composed of six frigates, when entitled to a captain of a fleet or flag captain. The preceding extract is only quoted to establish that the grade *is recognized* by the *new* table of complements, the declaration of the Acting Secretary to the contrary notwithstanding.

That a captain of a fleet is there used synonymous with flag captain, is, we presume, not disputed, and affords authority for the appointment of Commander George N. Hollins, as flag captain of the squadron commanded by Commodore Dallas on the Pacific station, in the year 1843.

NAVY DEPARTMENT, *July* 27, 1843.

"SIR: You will proceed to New York, and report to Captain Stringham for a passage in the United States frigate Savannah, and on your arrival in the Pacific, you will report to Commodore A. J. Dallas, for the command of that ship, as his flag captain, it being his wish that you should be ordered in that capacity.

"I am, respectfully, your obedient servant,

"DAVID HENSHAW.

"Commander GEORGE N. HOLLINS,
"*United States Navy, Washington, D. C.*"

In stating that the above regulation afforded authority for the appointment of Commander Hollins, we are not stictly correct, but it affords authority for the appointment of flag captain, *aided* by the *dispensing* power of the Secretary, on this occasion exercised as respects the *force* of the squadron, that in the Pacific not being composed of six frigates, indeed being of inferior force to that command by the same officer in the West Indies, to which claimant was attached.

On the rejection of the claim, a correspondence ensued between Mr. Secretary Paulding and claimant, extending to several letters. On the 13th of November, 1839, Mr. Paulding informed him that the decision of the Auditor was concurred in by the department; and added, "No new facts in the case have since been adduced, and the department cannot reconsider it." On the 31st of July, 1840, claimant again addressed Mr. Paulding, to which he replied:

"NAVY DEPARTMENT, *September* 26, 1840.

"SIR: Your letter of the 31st July last was received. If you will again submit your claim for increased pay while on board the Constellation, the department will reconsider the decision which has been given upon it.

"I am, very respectfully, your obedient servant,

J. K. PAULDING.

"Commander JAMES Mc. McINTOSH,
"*U. S. Navy, New York.*"

The claim was again accordingly submitted, and, on the 12th of October following, *allowed*, in a letter from Mr. Paulding to the Fourth Auditor, in these words: "The claim of Commander Mc. McIntosh, for pay as flag captain, while serving in that capacity on board the Constellation, under the appointment of Commodore Dallas, had been again brought to the notice of the department; that the department had lately declined allowing this claim, on the ground that, in the opinion of the accounting officers of the treasury, it could not be *legally* done; but that it appearing *that there was in fact no law pro-*

hibiting the allowance, but a regulation only, which might be modified or dispensed with, at the discretion of the department, the claim (for pay as flag captain of the Constellation from the 14th of August, 1837, to the 3d of September, 1838,) *was allowed.*" I have not a copy of that letter, but furnish the preceding extract, as quoted in the letter or opinion of the Auditor in reply, dated October 19, 1840, annexed.

To that decision of the Secretary, which claimant supposed was final, the Auditor, in reply, stated, "*there is in fact law prohibiting the allowance;*" a conclusion arrived at by the following argument:

That the act of March 5, 1835, "prescribes the compensation of the various classes of officers therein mentioned, amongst which are 'masters, commanders, and lieutenants commanding;' providing *that officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade, while actually so employed;* and it expressly declares that the yearly allowance provided in that act is 'all the pay, compensation, and allowance that shall be received, under any circumstances whatever, by any such officer, except for travelling expenses.' During a part of the period in question, Mr. Mc McIntosh was a lieutenant, and during the other part he was a commander, and he has always been allowed the pay specified in the act as belonging to those classes of officers. Unless, then, it should appear that, during the time embraced by the claim, he was actually performing the duties of a grade superior to his own, by which he would be brought within the terms of the provision above cited, *I cannot be wrong in asserting that there is in fact a law prohibiting* the additional allowance which he claims."

The Auditor thus presents the proposition, and asserts that the allowance is against *law, an act of Congress, in contradistinction to a regulation adopted by the Navy Department;* whereas, in truth, the objection to claimant's being embraced in the provision of the act, that "officers temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade," arises from his being appointed flag captain of a squadron composed of less than six frigates, that being the *force* required by the regulation to entitle a squadron to an officer of that grade; and it is confidently believed that the allowance of his claim would conflict only with a *regulation of the Navy Department*, and not with an act of Congress, as the Auditor supposes.

That the appropriate duties of flag captain were performed, cannot be denied; that those duties pertained to a higher grade than that of commander, or lieutenant commanding, and that the grade is recognized by the regulations of the navy, is equally true; but it is denied that the squadron was so composed as to be entitled to a flag captain, which, by regulation, not law, must be composed of six frigates. Hence, the allowance of pay was prohibited by a *regulation only*, which might be modified or dispensed with by the head of the department, and not "in fact prohibited by law," as the Auditor decided. That the regulation may be dispensed with is obvious from principle; that it may be, we have the declaration of Mr. Paulding, and the practice of Secretary Henshaw in the appointment of Commander Hollins.

Mr. Paulding was correct in stating that "there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the department." Having official discretion, he removed the disability which the regulation interposed, and decided to allow the claim. All that remained for the Auditor was purely *ministerial.*

It is submitted, that though the *letter* of the regulation may have been transgressed, it was not so in *spirit*, as the squadron mounted as many guns as if composed of six frigates.

Having established that the grade was recognized, we will proceed next to consider whether the appointment was sanctioned.

Claimant was in command of the Grampus, by order of the Secretary of the Navy, when the order of the 14th of August, 1837, was issued. Simultaneously, Commodore Dallas ordered Lieutenant Engle to succeed him in that command. His appointment as flag captain, and that of Lieutenant Engle to the command of the Grampus, were forthwith communicated to the Navy Department; the appointment of Lieutenant Engle was immediately, in writing, confirmed, *and no notice whatever taken by the department of the disposition which had been made of claimant.*

As a legal proposition, we claim, that, in sanctioning the appointment of a successor to a station which the claimant had occupied, by order of the Navy Department, (the vacancy being created by an order assigning him to another station,) without noticing his removal, virtually sanctioned his appointment, with the same efficacy as a *material act.*

The argument may be advanced, that, inasmuch as the Secretary *acted* on one part of the change, and omitted to do so in regard to the other, the inference is, that the other part of the arrangement was not approved. That argument is neither sound in principle nor safe in practice, and would lead to endless confusion. What would be the effect in this particular case? Claimant's command was given to another, and (assuming his appointment not to be sanctioned) *there is no disposition made of claimant;* he was consequently without position. It is wholly incompatible with the system and good order of the public service, that an officer should be removed from a station assigned by the head of the department, by an officer subordinate to that head, and thus be *lost sight of,* as it were, *discarded from the supervisory regard of that department,* and cannot be presumed. The solution rather is that, as claimant had been removed from a station to which *an order of the department* had assigned him, it occurred to the Secretary that such change required confirmation *as respected his successor;* hence the express sanction; whereas his appointment, removing no one, interfering with no one, was tacitly approved. The inquiries of "what had become of Lieutenant Mc .McIntosh?" "For what object had he been removed?" would naturally be suggested to the mind of the Secretary on confirming the appointment of his successor, answered by the communications of the commander-in-chief. *Thus informed, not forbidding, by legal presumption approved;* the alternative involves the censure of the department, in imagining that claimant was overlooked, and is not to be adopted where it may be consistently avoided;

and is not to be *presumed* in disposing of his rights. The reasons for making his appointment were communicated to the department; and as he was permitted to occupy the station, gazetted in the Army and Navy Chronicle, issuing orders in that capacity, without objection, until the 14th of October, 1837, (a period of two months,) "we cannot be wrong in asserting," that the appointment was sanctioned by a *collateral act.*

We have assumed in these remarks, and so stated in the memorial, that no objection or allusion to claimant's appointment was made prior to the 14th of October, 1837. If in this we are in error, we positively assert that such objection was not communicated to Commodore Dallas or claimant. It is, however, proper to refer to a passage in the Auditor's letter of the 19th of October, 1840, in part conflicting with that statement. He says: "It appears that after Commodore Dallas had ordered Lieutenant Mc. McIntosh to act as flag captain, he informed the department of the fact, and that he had directed the purser to pay him as commander. The payment thus directed was disallowed by the Secretary after a reference to Mr. Pickett, the Fourth Auditor, for his opinion on the subject. *This was in August*, 1837; and on the 5th of January, 1838, the Secretary *expressly informed* Commodore Dallas, that he could not recognize Lieutenant Mc. McIntosh as a commander, but was willing to recognize him as lieutenant commanding, which pay he has received."

The Auditor says, the payment thus directed was referred by the Secretary to Mr Pickett; that Mr. Pickett gave his opinion, on which the Secretary disallowed the pay. In the computation of short time, the reference by the Secretary to Mr. Pickett, the opinion or report of the latter and the judgment of the former is of much importance, the numerous engagements of those functionaries considered. Claimant's orders are dated 14th of August, 1837, at *Pensacola*, and it is doubted whether they could have been transmitted to *Washington*, and those proceedings had before the expiration of the month, admitting that the indefinite date of "August, 1837," related to the last day of that month. It would have been more satisfactory had the *particular* date of the Secretary's decision on Mr. Pickett's report been given with the Auditor's usual precision. Again, it seems rather extraordinary that the opinion of an accounting officer should, in *advance*, be required. At that time the increased pay had neither been earned nor required. At all events, if such decision was made, and not communicated, to Commodore Dallas or claimant, it cannot be invoked to impair this claim. That it was not communicated appears from claimant's asseveration, and may be inferred from the remark of the Auditor in the next passage, that on the 5th of January, 1838, the Secretary *expressly informed* Commodore Dallas that he could not recognize Lieutenant Mc. McIntosh as a commander, but was willing to recognize him as a lieutenant commanding. The expression "expressly informed," from the context, excludes the idea that the decision on Mr. Pickett's report was ever communicated to claimant. We shall, therefore, in considering the question of sanction, assume that the Secretary's letter of the 14th of October, 1837, made the first allusion to claimant's change of employment.

In that letter the Secretary expressed his *regret* that it was not in his *power* to make an "*acting commander.*" Commodore Dallas at once replied that he had not appointed claimant "acting commander," but had appointed him *flag captain.* To the commodore's letter no reply was received, and he again wrote, communicating a copy of his previous letter:

Copy. { "22*d December*, 1837." Subjoined to copy of No. 177.

"SIR: Not having received a reply to my last communication, made in relation to Lieutenant Mc. McIntosh, I fear it has not been received, and I take the liberty to send a copy of it, with a request that the department will let me know their determination on the subject.

"I have the honor to be, very respectfully, your obedient servant,
"A. J. DALLAS.

"Hon. M. DICKERSON,
"*Secretary of the Navy.*"

This letter was not replied to by the Secretary in person, with whom the previous correspondence had been held, and who was possessed of all the facts, but by the *Acting* Secretary, who stated that the Secretary had already disapproved claimant's appointment.

From the preceding state of facts, we contend that the appointment of *flag captain* had not been disapproved. The objection of the Secretary, on the 14th of October, 1837, was under a misapprehension of the commodore's order, which he supposed appointed an "*acting commander.*" If he intended that letter as disapproving the appointment of *flag captain*, he would so have expressed himself. Had he not been under a misapprehension, it is to be assumed, from the tenor of his letter, in connexion with the commodore's letter, *presenting his reasons for making the appointment*, that he would not have objected. The Secretary expressed his regret at not having authority to make an "acting commander;" and the intendment is, that, in expressing such regret, he admitted the expediency of an acting commander's appointment, but did not make it, *owing alone to the want of authority.* That reason was paramount for declining to approve of what he supposed was the appointment of *acting commander*, but not that of *flag captain*, manifestly within the scope of his authority, the necessity of which was sufficiently disclosed in the commodore's communication.

That this is not a sophistical deduction may reasonably be concluded, from the fact that Commodore Dallas, immediately on the receipt of the Secretary's letter, suggested the misapprehension, and continued claimant in the discharge of the like duties as before, and he was permitted so to remain without further notice from the department. If the deduction is not sound, what inference is to be derived from the unbroken silence of the department, after the explanation, but that the explanation was satisfactory, and the department concurred in the expediency of claimant's appointment? Still the Acting Secretary, in reply to Commodore Dallas' letter of the 22d of December, stated that the Secretary had already disapproved of it. When

had he so disapproved? His only letter on the subject was that of the 14th of October; in it the appointment of flag captain was not even mentioned. The Secretary rejected the want of authority to make the appointment of "acting commander," and did not touch claimant's case, as he held an appointment of a totally different grade; and we respectfully maintain, the *Acting* Secretary was wholly mistaken in saying that the Secretary had already disapproved of his appointment.

Again, the subject remained without the action of the department until the 5th of January, 1838, when it was brought to light by a note on the pay-roll opposite claimant's name, and the Secretary informed the commodore that he "*was willing to regard and pay him as lieutenant commanding.*" In August, 1838, after his promotion, Commodore Dallas advised the department that claimant would be continued in the discharge of the duties of flag captain, *to which no answer was given*, and he was thus employed until he sailed in the frigate for Boston. The reason assigned by the Auditor for the Secretary's silence is thus stated: "After Mr. Mc. McIntosh had been promoted to the office of commander, Commodore Dallas, in August, 1838, wrote again to the department, stating that he (Mr. Mc. McIntosh) had been retained on board the Constellation in the performance of the same duties, and asking how he was to be paid; to which communication it is believed no answer was given, *owing, probably, to an idea entertained by the Secretary that his views upon the subject had been sufficiently expressed in his previous communication.*"

To which communication the Auditor refers, (he speaks in the singular number,) we do not understand. To that of the 14th of October, 1837? We have shown it did not relate to the matter, but to the office of "acting commander." To that of 5th of January, 1838? To it there could be no sensible application, (adverse to the claim,) as the circumstances had materially changed when the commodore wrote in August, 1838, (in the meantime claimant having been advanced to the rank of commander,) and it could not have been contemplated to keep him on board the Constellation in a rank inferior to his commission. Those were the only letters from the Secretary.

We cannot think a reply was not given, "owing probably an idea entertained by the Secretary that he had sufficiently expressed his views," as suggested by the Auditor. The Secretary would hardly permit an officer of the rank and standing of Commodore Dallas to move in doubt on a subject of official duty, when respectfully addressed, for the punctilious reason that he supposed he had already been sufficiently explicit, especially as the consequences were flowing on, and would only be arrested by a reply. We are unwilling to attribute that lack of courtesy to the head of a department. If, however, the silence was designed for the reason assigned by the Auditor, the truth of the reason becomes important, as if the Secretary had not "sufficiently expressed his views," claimant's appointment was impliedly sanctioned, and entitles him to the compensation allowed by law. We most confidently refer to the Secretary's letter of the 14th of October, 1837, with Commodore Dallas' reply and letter of 22d December, 1837, together with the Acting Secretary's rejoinder, and

maintain, with respect, that these letters far more sanction than disapprove the appointment, for the reasons we have stated, especially so when reinforced by the letter of August, 1838, to which there was *no reply.*

It may be said there is an obstacle to be overcome in the Secretary's letter of the 5th of January, 1838, stating that claimant was to be *regarded and paid as lieutenant commanding;* instead of offering an obstacle, *that letter establishes the claim*, as will be presently shown, as a legal consequence. If that letter is to have a *retrospective operation,* it relates back to the date of claimant's orders on the 14th of August, 1837, and the Secretary meant to be understood to say, "Mr. Mc. McIntosh has been regarded as lieutenant commanding from the time he was ordered to the Constellation, and is to be paid as lieutenant commanding from that time."

If the order was *prospective*, and is considered as refusing to sanction claimant's appointment, it cannot affect the five previous months of his employment as flag captain.

Here we stand on the broad platform of the law, and cheerfully appeal to this Court to establish that the act of Congress entitled claimant to *captain's pay* the moment the Secretary decided that he was regarded as lieutenant commanding the frigate Constellation. The points involved in that decision are few and simple.

1. He was "regarded" *lieutenant commanding a frigate.*

2. A frigate is the appropriate command of a *captain.*

3. In performing the duties of lieutenant commanding a *frigate,* he temporarily performed the duties belonging to the grade of *captain.*

4. The act of Congress, approved March 3, 1835, provides that "officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade while actually so employed."

5. The compensation is established in the second of the following provisions of that act, (to be intelligible both are necessarily quoted.)

"All other captains when in command of *squadrons* on foreign stations, $4,000."

"When *on other duty*, $3,500."

The duties which claimant performed as lieutenant commanding were those belonging to the grade of captain, not "commanding a squadron on foreign service," but "on other duty."

With whatever confidence we appeal to this Court to establish this claim, it has not, however, met the favorable consideration of the Auditor, who thus summarily disposes of claimant's appointment as "lieutenant commanding." In his letter of the 18th of December, 1838, he says: "I confess that this communication by the Secretary is *inexplicable by me, and I can only regard it as an anomaly.*" Again, in his letter of the 9th February, 1839, he says: "Notwithstanding you state that you were not satisfied in regard to an anomaly of the late Secretary of the Navy, which I *did not attempt to explain, and which I presume no one could explain,* but which, on that very account, could not reasonably be expected to have any influence on my judgment."

The "anomaly" consists in recognizing claimant as "lieutenant commanding" a frigate, and allowing him the pay of "lieutenant commanding" a vessel of that class usually commanded by lieutenants, (brigs and schooners,) notwithstanding the act provides that "officers performing the duties belonging to those of a higher grade shall receive the compensation of such higher grade while so actually employed."

In correct parlance, rather than an *anomaly*, the order should be considered an *inconsistency*, there being such contrariety, that both the rank and the limited pay cannot subsist together, the pay of captain following the duties of lieutenant commanding a frigate. As both parts of the order cannot stand together, the Auditor, in his capacity of accounting officer, finds authority to nullify the act, in denying claimant the compensation to which the first branch of the order entitled him under the act.

Petitioner's claim under that letter became vested, and could not be disposed of, on the score of its being *anomalous* or inconsistent. If the Secretary committed an error, that error should inure to advantage of claimant and not prejudice, as he performed the duties required of him. *It is indeed an anomaly, that the government should set up its own anomaly to defeat his claim.*

It was the province of the Secretary to appoint him lieutenant commanding the Constellation; so much of his act is valid and effectual. He coupled the appointment with a direction as to the pay to be received; that regulation of the pay was void and ineffectual; it was *official legislation.* So much of the order as was within the legitimate authority of the Secretary should be sustained, and was executed by claimant; such part as transcended his power was inoperative. It is not to the Navy Department that we are to refer, to ascertain the appropriate pay of a particular grade, but to the act of Congress. The act is the common guide, as well of the Secretary as claimant. The moment he was recognized as lieutenant commanding the frigate Constellation, the claim to captain's pay sprang into existence, under the act of Congress. With the same propriety the Secretary might direct that captains should receive the pay of midshipmen, as that lieutenants commanding should receive less than Congress has appropriated.

To prevent misapprehension as to the appropriate grade to command a frigate, as a matter of law, independent of usage, we cite the act of February 25, 1799, 1 Story, p. 563, sec. 1: "Be it enacted, that all vessels in the service of the United States, *mounting twenty guns and upwards, be commanded by captains;* those not exceeding eighteen guns, (except galleys, which are to be commanded as heretofore provided by law,) by masters or lieutenants, according to the size of the vessel, to be regulated by the President of the United States."

Either the Secretary's order, or declaration, that claimant was regarded lieutenant commanding the Constellation, was impracticable, and a dead letter in all its parts, or he is entitled to its full effect, as regards that part within the scope of his authority, it belonging to the Secretary to make the appointment as lieutenant commanding. If it is a dead letter, it was without efficacy for *any* purpose, and should

not be brought in judgment against claimant, to establish that his original appointment as flag captain had been *thereby* disapproved.

One other objection of the Auditor. He says, in a letter to Mr. Paulding of the 15th of November, 1838, "if he shall produce the evidence required by the rules of this office, to show that he actually performed the duties of commander of the Constellation, his claim will be allowed; but as it was held by your predecessor, and has been adopted as a rule of this office, that before an officer can be allowed the pay of a superior grade, under the act of March 3, 1835, it must appear that, including himself, there was not more than a complement of officers of such grade on board the vessel in which the service is alleged to have been performed, and as is stated in the tables of complements, issued by the Navy Department on the 28*th of January* last, (1838,) that when the commander of a squadron is also the commander of a particular vessel, he is to be borne as part of her complement."

To that objection the answer is, that the department could, at its discretion, modify or dispense with its own rules, and did so by the tacit sanction of claimant's appointment as flag captain, and did so, in saying he was regarded as lieutenant "commanding" the frigate. It was as competent for the department to appoint him lieutenant commanding the frigate, notwithstanding Commodore Dallas was borne as part of her complement, and dispense with the regulation quoted, as it was competent for Secretary Henshaw to appoint Commander Hollins flag captain of the Pacific squadron, composed of less than six frigates, notwithstanding the regulation provides that a squadron is not entitled to a flag captain which is not thus composed. In both cases the department had plenary powers.

Also, a perfect answer is, that claimant's appointment of flag captain bears date on the 14th of August, 1837, and cannot be affected by a regulation adopted on the 28th of January, *five months after the appointment made.* Again, the letter of the Secretary recognizing him lieutenant commanding bears date the 5th of January, 1838, and that rank cannot be affected by a regulation dated on the 28th of January, 1838, *twenty-three days after.* So far as regards that regulation, the claimant's rights had become absolute and could not be defeated by it.

Whether that regulation was to operate prospectively or otherwise, this case is not affected by it. The regulation did not "*per se*" detach claimant from the ship; it did not affect, *of itself*, the object to be accomplished, *but required to be carried into execution by an order from the department.* As no order to that effect was issued, the principle established by the regulation was not made to apply to petitioner. This proposition is too plain to require argument in support of it.

We think we have now shown that the reasons assigned for neglecting this claim are not sustained by the rules and regulations of the navy, or the act of Congress establishing the pay-bill. The statement of the *Acting* Secretary, that "such an officer as flag captain of any vessel of war is not recognized or provided for either by the old or new tables of complements of the different classes of vessels," is plainly contradicted by the *old* as well as the *new* regulations. That the appointment is

within the *spirit* of the regulation, may truly be said, as the squadron to which claimant was attached mounted as many guns as if it had been composed of six frigates. That the appointment was impliedly sanctioned by a *collateral* act, in confirming the appointment of his successor to the Grampus, and that it was so, by the silence of the department, notwithstanding the direct course pursued by Commodore Dallas in pressing a decision, is fully supported by the most familiar principles of law. That in fact there was no law, but a regulation only, which might be modified or dispensed with by the department, and was so dispensed with by Mr. Paulding, is equally plain; and that, in regarding claimant as "lieutenant commanding" the Constellation, he became entitled to pay as *captain*, the acts of Congress establish.

Before concluding the review of the Auditor's objections, it is proper to advert to his legal propositions. After arguing that the appointment had not been sanctioned, he says: "But had the department remained altogether silent, the case, in my view, would not have been altered. It must be admitted, I think, without any hesitation, that the appointment made by Commodore Dallas was, in the first instance, wholly unauthorized and illegal; for although, like other commanders on foreign stations, he had a general authority to confer acting appointments, he certainly had no power to *create* the officers to which the appointments were to be made, which he must have done in this case, inasmuch as, by the regulations of the navy then existing, a flag captain was not allowed to a squadron of the size of that which he commanded. Of an act thus done, without a shadow of authority, he had no right from the silence of the department to infer its approbation; but he was, upon correct principles, bound to infer the contrary. A *positive* order, or declaration of the department, at least, was requisite to make a proceeding valid, which was before invalid. The principle, so far as I am aware, has never been admitted by any jurisdiction, that an illegal act on the part of an inferior officer may be legalized by notice to his superior, and by the omission of the latter to express his disapprobation."

The preceding summary of the Auditor's views is, we think, replete with propositions, novel and unsound. Can it be imputed to Commodore Dallas that he *created an office* in making this appointment? The regulation created and established the office. At most, the commodore transgressed the letter of that regulation. Nor is it consonant with established principles of law to say "he had no right, from the silence of the department, to infer its approbation. A *positive order*, or *declaration* of the department, at least, was required to make a proceeding valid which before was invalid." It is conceded, on all hands, that the department had the power to dispense with its own regulations; and we contend, as a principle of law, that this appointment could as effectually be sanctioned by silence after notice, as by a material act. The Auditor adds: "The principle, so far as I am aware, has never been admitted *by any jurisdiction* that an *illegal* act on the part of an inferior officer may be legalized *by notice* to his superior, and by the omission of the latter to express his disapprobation."

If this claim is to be disposed of on the proposition, that an *un-*

authorized act is not sanctioned by notice followed by silence, it is free from embarrassment, as a few adjudicated cases will establish. If the expression "illegal act" refers to a *criminal* act, we fully concur with the Auditor; even approbation would not legalize it; but if the expression refers to an *unauthorized* act, we contend that it has "been admitted," by many "jurisdictions," that the notice and "omission to express disapprobation" does "legalize" or sanction the act, and is equivalent to an express authority. We refer to 2 Kent's Commentaries, page 616, where the commentator says: "When the principal is informed of what has been done, he must dissent, and give notice of it, in a reasonable time, and if he does not, his assent and ratification will be presumed: "*Semper qui non prohibet per se intervenire mandare creditur;*" and in support of the principle, he cites Fowler *vs.* Stevenson, 1 Johnson's Cases, 110; Cairnes & Lord *vs.* Bleecker, 12 Jones' Rep., 300; Erick *vs.* Johnson, 6 Mass. Rep., 193; Frothingham *vs.* Haly, 3 Ibid., 70; Clement *vs.* Jones, 12 Ibid., 60; Shaw *vs.* Nudd, 8 Pickering's Rep., 9; Merlin Questions de Droit, vol. i., 482. The law of the Auditor cannot be sustained against that array of authorities, and "we cannot be wrong in asserting" "that an alleged," (unauthorized) "act on the part of an inferior officer, *may be* legalized" (ratified) "by notice to his superior, and by the omission of the latter to express his disapprobation." Claimant's appointment was ratified by the silence of the department, and that silence is not *satisfactorily* accounted for in saying that "no answer was given, owing probably to an idea entertained by the Secretary, that his views had been sufficiently expressed in his previous communication," so as to defeat the legal consequence of that silence. Can it be tolerated, that respectful communications, relating to official duty, are to be disregarded, even if the subject of the communication had before been fully disposed of; much less when disorganization is the result of that silence? Had the commander-in-chief pertinaciously annoyed the department, on a subject which had been explicitly disposed of, the communication should, nevertheless, have been answered, and the appropriate remedy resorted to; and the omission to answer the letter in question is not to be attributed to negligence or abuse of authority, but rather approbation is to be intended from the course which has been pursued.

The Auditor says: "a positive order, or declaration of the department was necessary to make a proceeding valid which before was invalid." We insist that silence sanctioned this appointment; that the confirmation of the appointment of the successor of claimant to the Grampus sanctioned it; and that, *to defeat* such an implied sanction, "a positive order, or declaration of the department was requisite." A *positive order should have been issued to dispose of claimant*, if the department did not contemplate to confirm his appointment.

His duty was unhesitating obedience to the commodore's order. The order was positive, "to repair on board the United States frigate Constellation forthwith, and assume the duties of that station," (the station of flag captain.) Disobedience would have hazarded his commission. Thirty years' service had taught him that prompt and

cheerful obedience of orders is of the deepest importance, and constitutes the first duty of an officer.

If the appointment was not sanctioned, it follows that, having been detached from the Grampus, he was in fact placed on *leave of absence—put off duty*. Suppose he had assumed the ground now occupied by the Auditor, that a "positive order, or declaration of the department, was necessary to render the proceeding valid," and on finding the appointment of his successor confirmed, and no "positive order or declaration" made as respected him, had left the ship, and for so doing been put on trial for disobedience of orders, could he have defended himself on that ground? It certainly would have been a dangerous experiment. He pursued the only course dictated by duty, and should not be prejudiced by the miscarriage of his superiors. Difficulties encountered him on every side: He had lost command of the Grampus; could not have left the Constellation; was obliged to discharge the duties belonging to those of a "superior grade," and was not to be compensated for them as the act prescribes.

We have stated that the appointment received a *collateral* sanction in the confirmation of claimant's successor to the Grampus, and cite Loraine *vs.* Cartwright, 3 Mason's Rep. 154, when Mr. Justice Washington, under his 3d inquiry, says: "There is no doubt but that a principal may ratify the act of one who has acted in his behalf as his agent, though without authority, or who has transcended his powers, and in this way give validity to the act, as if it had been strictly authorized in the first instance. *This ratification may take place not only directly, but by collateral acts.*" In this case, the "collateral act" is the confirmation of claimant's successor.

The claim was virtually allowed by the Secretary, in *the terms of reference* to the Auditor, on the 6th October, 1838, as stated in the following letter:

"NAVY DEPARTMENT, 10*th October*, 1838.

"SIR: Your communication of the 26th ult. has been received. In answer, I have to state, that your papers have been referred to the Fourth Auditor of the Treasury, *with the request that he will pay you what the law or the regulations of the service will justify*.

"Leave of absence will be immediately transmitted to you, according to your request.

"I am, sir, very respectfully, &c.,

"JOHN BOYLE,
"*Acting Secretary of the Navy.*

"Commander JAMES Mc. McINTOSH,
"*Boston, Massachusetts.*"

In the Auditor's letter of 13th of October, he says: "One of the papers referred to was an order from Commodore Dallas, dated August 14, 1837, appointing claimant flag captain of the squadron under his command, and the other was a letter from the same officer on the subject."

It is not torturing the direction of the Secretary to "pay claimant what the law or the regulation would justify," *at the same time*

enclosing his appointment as flag captain, to say that the Auditor *had merely a ministerial duty to perform;* that the appointment was communicated as a guide in the allowance of pay, and precluded him from *looking behind* that appointment, any more than he would have the right to look behind claimant's present commission, *to ascertain whether it had been issued with all the forms appointed by law.* The effect of communicating his appointment was to inform the accounting officer that he had been appointed flag captain, and it was his province only to compute the amount due.

It was again *absolutely* and *positively* allowed by Mr. Paulding, on the 12th of October, 1840, in advising the Auditor, "that it appearing there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the department, the claim (for pay of flag captain from the 14th of August, 1837, to the 3d of September, 1838,) *was allowed.*" Notwithstanding that decision, the Auditor held that the allowance was against *law.* We have shown he was therein mistaken. On the contrary, the regulation interposed the only disability, and that was removed by the Secretary.

The Auditor, however, suggested another doubt; he says: "There is no doubt that the department has a right to modify or dispense with its rules prospectively, but it admits of a serious question, at least, whether a rule can be made, altered, or repealed to affect a previous transaction, in which the rights of an individual or government are concerned, and thus to produce the effect of an *ex post facto* law. I do not consider it necessary, however, in the decision of this case, to determine the point; for any change, at the present time, of the rules which operated to prevent Commander Mc. McIntosh from receiving the pay of flag captain at the time when the services for which he claims were performed, would be, in effect, an alteration of the act of Congress.

Is the proposition sound, that Mr. Secretary Paulding had not the right, retrospectively, to remove the disability which the *regulation* interposed to the allowance of the claim? Unquestionably it will not be contended that Mr. Dickerson had not that right, as one of the great points of the case made by the Auditor is the question of sanction, who admits that if the appointment had been sanctioned by Mr. Dickerson, the claim would be allowed. If so, the same right devolved on Mr. Paulding. That authority is an incident to the office, not the incumbent; the office never dies, and the powers follow the succession. There is no law limiting, in point of time, the exercise of the dispensing power of the Secretary of the Navy; the office is the same whoever administers it. If it is an inherent power of the officer to modify or to dispense with its rules, who is to set up a *statute of limitations* to the exercise of that power? It is true there is always a delicacy on the part of a successor to reverse the decisions of his predecessor; still the authority exists. Mr. Paulding, in a sound discretion, exercised his prerogative, and it should not have become the subject of the Auditor's comment.

If claimant is entitled to extra pay at all, he should receive the pay of a captain commanding a frigate, as the order of the Secretary

making him a lieutenant commanding placed him in command of the Constellation, and it would be unwise to hint at any less emolument. Mr. Dayton says, in his letter of the 15th November, 1838, page —: "If he shall produce the evidence required by the rules of this office to show that he *actually performed* the duties of commander of the Constellation, his claim shall be allowed." What stronger proof could be required than the official letters of the commander-in-chief of the squadron we cannot imagine. But Mr. Dayton had further proof, for Lieutenant Johnson, who was, for a portion of the time, first lieutenant of the Constellation, called upon and told him, "that whatever errors were committed in wording claimant's appointment, they should not damage his claim, for he, (Lieutenant J.,) as all the other officers attached to the Constellation, considered claimant as her captain." Would the Secretary of the Navy have allowed claimant to remain as a commander on board the Constellation *unemployed*, as Mr. Dayton contends, while lieutenants were in command of sloops-of-war, receiving commanders' sea pay, until commanders could be ordered to the station, having the additional expenses of their travelling to incur? It were idle to suppose such ignorance or want of foresight in the head of the department. Yet such was the case with the Boston, Erie, and other sloops-of-war. In his letter of the 20th November, ——, page —, the Fourth Auditor says: "Commodore Dallas was himself the commander of the Constellation, and she had consequently her complement without your (claimant's) appointment." Commodore Dallas sailed from the United States in the Constellation frigate, as commander-in-chief of the home squadron, without a captain to his flagship, because there was some disagreement between the honorable Secretary of the Navy and himself as to her captain, and the limited number of the vessels of the squadron enabling him, as he believed at the time, to attend to the details. There can be no doubt of this, because no sloop-of-war carrying a commander's pennant on that station had ever been without her captain independent of the commodore. But when he found his squadron much increased, and his duties multiplying upon him, and he could no longer perform them, he, as the commander-in-chief of a foreign squadron, and having, *as the Fourth Auditor admits, the power of appointment*, ordered a captain to his ship, and informed the department that he had done so, because unaided he could no longer execute the duties. And when he made claimant his captain, he was no longer commander of the *Constellation*, but commander-in-chief of the *squadron*. And what signifies it, whether he called claimant *flag captain*, or that the Secretary chose to call him *lieutenant commanding?* He was the *captain* of the Constellation, and common sense and common justice should give him the pay. And that a captain was necessary is apparent from the fact, that Commodore Shubrick, relieving Commodore Dallas, when the squadron had been much reduced, had Captain Kennon as the captain of the Macedonian, his flagship.

In the Auditor's letter of October 19, 1840, he says: "The case turns upon the single question of fact, whether he (claimant) performed, during the period in question, the duties of a grade superior to his own." The commander-in-chief of the squadron says he did

perform the duties; the Secretary of the Navy says he did; for, although he would not make claimant an acting commander, he recognized him as lieutenant commanding the Constellation frigate, because he was performing those duties. In his letter of December 18, 1838, the Auditor remarks, in relation to the Secretary's recognizing him as lieutenant commanding: "I confess that this communication of the Secretary is inexplicable by me, and I can regard it only as an anomaly." Is not this a sacrifice of justice to form? A plain written order of the department "an anomaly," because it was at variance with a pre-determined opinion of an accounting officer!

We contend that claimant is entitled to a captain's pay, because, by the Secretary's order, he was recognized as a lieutenant commanding a frigate. A frigate is the appropriate command of a captain, and in performing the duties of lieutenant commanding a frigate, he temporarily performed the duties belonging to a *captain, and the law at the time established the pay.*

The preceding observations are respectfully offered to establish that the accounting officers of the treasury erred in disallowing a claim for services rendered to the United States, marked with every evidence of merit. We have shown that in law it should have been admitted, and that the reasons assigned for its rejection do not justify that measure. We do not design to impugn the motives of the Auditor, but are assured he has arrived at that disagreeable result alone from a conscientious discharge of a public duty; his letters abound in acknowledgments of the *hardship of claimant's case*, and state, "*that, had he an equitable discretion, he should certainly have been induced to allow claimant more.*" Placed in a false position by orders requiring implicit obedience, claimant has been exposed to serious expense and domestic inconvenience; was removed from an independent command, and deprived of the emoluments incident to it, arising from commissions payable on the transportation of specie, under the favorable circumstances presented by the existing difficulties of Mexico with other powers, as received by the commanders of the other vessels of the squadron, under the provisions of 23d article of the 1st section of the act entitled "An act for the better government of the navy of the United States," approved April 23, 1800. He was also prevented from availing himself of opportunities to command sloops-of-war, committed to his juniors, to which his date of commission entitled him.

All of which is respectfully submitted.

BIRCHETT & DOWNING,
Counsel for Claimant.

Correspondence, &c.

"UNITED STATES FRIGATE CONSTELLATION,
"*Pensacola Bay, August* 14, 1837.

"SIR: You are hereby appointed flag captain of the squadron under my command, and will repair on board of the United States frigate

Constellation forthwith, and assume the duties of that station. You will receive pay of a commander.

"Respectfully, your obedient servant,

"A. J. DALLAS.

"Lieutenant Commanding JAMES Mc. McINTOSH,
"*United States Schooner Grampus.*"

[Copy subjoined to copy of No. 177.]

DECEMBER 22, 1837.

SIR: Not having received a reply to my last communication made in relation to Lieutenant Mc. McIntosh, I fear it has not been received, and I take the liberty to send a copy of it, with a request that the department will let me know their determination on the subject.

I have the honor to be, very respectfully, your obedient servant,

A. J. DALLAS.

Hon. M. DICKERSON,
Secretary of the Navy.

NAVY DEPARTMENT,
October 10, 1838.

SIR: Your communication of the 26th ultimo has been received. In answer, I have to state that your papers have been referred to the Fourth Auditor of the Treasury, with a request that he will pay you what the law or the regulations of the service will justify.

Leave of absence will be immediately transmitted to you, according to your request.

I am, sir, very respectfully, &c.,

JOHN BOYLE,
Acting Secretary of the Navy.

Commander JAMES Mc. McINTOSH,
Boston, Massachusetts.

TREASURY DEPARTMENT,
Fourth Auditor's Office, October 13, 1838.

SIR: A letter was received at this office a few days since from the Secretary of the Navy, stating that he enclosed the papers in your case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to was an order from Commodore Dallas, dated August 14, 1837, appointing

you flag captain of the squadron under his command, and the other was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as flag captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the department. To this note I have received the following reply: "In reply to your letter of yesterday's date, I have to state that the appointment of Commander J. Mc. McIntosh, by Commodore Dallas, to be flag captain, was *not* sanctioned by the Secretary of the Navy, nor is such an officer as flag captain of any vessel-of-war recognized or provided for either by the old or new table of complements of the different classes of vessels of the United States navy." I need hardly say that it is not in my power to allow you an increase of pay upon the ground of an appointment which thus appears to have been made without sufficient authority.

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Commander J. Mc. McINTOSH,
United States Frigate Constellation.

BRIDGEPORT, CONN.,
November 5, 1838.

SIR: I have to-day received a letter from the Fourth Auditor of the Treasury in regard to my pay as flag captain to Commodore Dallas, which has not a little astonished me; for, on my arrival at Boston, I received from Mr. Boyle, then acting as Secretary of the Navy, a communication stating that my papers had been referred to the Fourth Auditor of the Treasury, with the request that he would pay me what the law or the regulations of the service would justify; from which I inferred that the appointment which had been conferred on me by Commodore Dallas was sanctioned, and the Fourth Auditor of the Treasury requested to make or allow the pay of such appointment; for the pay of every officer is perfectly well known, and a reference elsewhere than to the purser of the ship or station I should not have considered necessary, except when claims for extra service, or some such cause, was agitated. As regards the situation I have held since the 14th of August, 1837, in the squadron under the command of Commodore Dallas, I have simply to state that I have been as much the captain of the Constellation as Commander Armstrong was of the Macedonian, or Lieutenant Stribling of the Peacock, both of whom, I understand, have received the additional pay. Of the former I can speak confidently, for he told me so, at Boston; the latter I only know from report, coming, however, from the best authority. Am I then, I would respectfully ask, to be deprived of the additional pay because my commander (unfortunately, it would appear,) placed the word "flag" before "captain," when I have faithfully and diligently, as he has been pleased to say to the department, performed all the duties which devolved on a captain; or is it probable he would have done me so great an act of injustice as to have retained me on board the

Constellation as a lieutenant, when my juniors were in command of sloops-of-war, receiving commander's pay? Or, let me again, with due respect, ask, what act of mine, since I have had the honor of serving in the navy, would authorize the belief that I would silently have submitted to such an arrangement? I have never, in any instance, waived, in the slightest degree, anything like rank, or ever shrunk from any responsibility calculated to bring me before my government and the public. When I do, I wish to be considered unworthy of any emolument. But I believed, as did my commander, that, in consideration of his extensive command and the multiplicity of his duties, the department would see the necessity of his being aided in the discharge of them, and my services would be appreciated. We were both strengthened in that opinion, when the late Secretary of the Navy was pleased to say that I might be allowed lieutenant commandant's pay; for with such pay I was acknowledged as having commanded something. I was then attached to the Constellation, and if the law allowed me anything extra, it was the pay of commander; and, as soon as I was promoted, Commodore Dallas informed the then Secretary of the Navy, in an application he made for the command of the Pensacola yard, that he would still retain me on board the Constellation; at the same time requesting, should he be ordered to that yard, that I might also receive orders to that station. This letter was written by the commodore himself, and not copied by his secretary, but was put in my hands for perusal, and, as far as my recollection serves me, was not marked as "private." Receiving no reply, and no objection being made to my remaining in the Constellation, and various communications having been sent to and acknowledged by the department, signed by me as flag captain, and all letters received from the department coming to me as attached to the Constellation, the appointment I considered sanctioned. I appeal, sir, to you with great confidence, and must request you to look into the case with your well known determination to award justice, and I shall not be apprehensive of the result. The situation in which I have been placed by executing the orders of my superior, an officer of high rank and acknowledged merit, is a peculiar one.

I was taken from the command of the schooner Grampus on the 14th of August, 1837, and ordered to the Constellation as his captain, with orders to the purser to pay me as a commander. This the honorable Secretary of the Navy was immediately informed of. And at this time the Boston was commanded by Lieutenant Engle, my junior in service, receiving commander's pay. I continued in the execution of the duties assigned me, without objection being made by the department, until late in October, when a letter was received, under date the 14th of that month, (two months elapsing between the dates of my appointment and the Secretary's letter,) stating that the department had no power to sanction an *acting appointment as commander*. I was directed to continue in the execution of the duties by Commodore Dallas; and he informed the Secretary of the Navy that he had not given me an acting appointment as commander, but ordered me to aid him, as his flag captain, in his duties, which had become too multiplied for him to give the attention necessary to them. Some two months again elapsed,

when the commodore was informed by the department that lieutenant commandant's pay might be allowed me. In the mean time I had lost command of the Boston, and with it the advantages. Again, as I before stated, on my promotion the commodore informed the department that I should be retained on board the Constellation; and I have been until she anchored off Charlestown navy yard. In what light, then, could I be viewed but as her commander? I conceive of none other. Could I have done so, I should have taken the Erie, commanded for the last three months by Lieutenant Farragut, and would, as he has done, have benefitted by the present state of commerce in Mexico. I have thus, sir, gone over my case, with what I am afraid you may consider a tedious detail; but I consider it as absolutely necessary to a thorough understanding of it. It has been my good fortune to be almost constantly employed since first I entered the navy; but I must say I have not been equally fortunate in obtaining what others have received for similar services; and, in saying so, I disclaim the most distant disposition to be disrespectful, and I rest the case in your hands, believing justice will be awarded.

I have the honor to be, &c., &c.,

JAMES Mc. McINTOSH, *Commander.*

Hon. JAMES K. PAULDING,
Secretary United States Navy.

TREASURY DEPARTMENT,
Fourth Auditor's Office, November 15, 1838.

SIR: I have had the honor to receive the letter addressed to you on the 5th instant by Commodore Mc. McIntosh, which was referredby you to this office, with a request that I would report the distinction between his case and those of Commander Armstrong and Lieutenant Stribling, alluded to in that letter.

Commander Armstrong was expressly *ordered by the department to take command of the frigate* Macedonian. Commander Mc. McIntosh had no such order, but merely received from Commodore Dallas what purported to be an acting appointment as "flag captain of the squadron," and upon that ground applied for the pay of a superior grade. Upon inquiry of the Acting Secretary of the Navy whether the appointment was sanctioned by the department, I was informed that it was *not*; and he furthermore observed that "such an officer as 'flag captain' of any vessel of war was not recognized or provided for, either by the old or new table of complements of the different classes of vessels of the United States navy." It was therefore determined by this office that Mr. Mc. McIntosh could have no allowance as "flag captain." He is understood now to claim the pay of a commander from the 4th of August, 1837, when he was ordered by Commodore Dallas to the Constellation, until his promotion to the rank of a commander, and the pay of a captain from that time until he left the vessel.

The case of Lieutenant Stribling, also, is easily distinguishable from that of Mr. Mc. McIntosh. It appears, from a certificate of Com-

modore Kennedy, and from a letter addressed by Lieutenant Stribling, on the 12th of December, 1837, to the Secretary of the Navy, to whom the question had been referred from this office, (which, as the claim was subsequently sanctioned by the department, I conclude must have contained a correct statement of facts,) that Commodore Kennedy, on the 9th of February, 1835, requested that Lieutenant Stribling might be ordered to the Peacock, for the purpose of being appointed by him commander, if he should think necessary; and that, in consequence of such request, he (Lieutenant S.) was ordered to that vessel; that the command was accordingly assigned to him by the commodore on the 24th of April, 1835, and that he performed the duties belonging to the station until the 7th of November, 1837; that, although subsequently to the appointment a letter was written to Commodore Kennedy by the Secretary of the Navy, stating that the department did not agree with him as to its necessity, the letter contained no direction to rescind it, and, even if it had, the communication was never received by the commodore, and could, therefore, have had no effect upon the arrangement which had been made. Lieutenant Stribling also appeared, by an entry upon the rolls of the vessel, to have been in command during the period in question.

It is unnecessary for me to point out the difference between the case, thus stated, and that of Mr. Mc. McIntosh, who, so far as appears, received no appointment as commander of the Constellation, but claims an increase of pay as having commanded that vessel under an appointment made, without the sanction, express or implied, of the Navy Department, to another office which had no existence. If he shall produce the evidence required by the rules of this office, to show that he *actually performed* the duties of commander of the Constellation, his claim will be allowed; but, as it was held by your predecessor, and has been adopted as a rule in this office, that before an officer can be allowed the pay of a superior grade, under the act of March 3, 1835, it must appear that, including himself, there was not more than a complement of officers of such superior grade on board the vessel in which the service is alleged to have been performed; and as it is stated in the table of complements issued by the Navy Department on the 28th of January last, that when the commander of a squadron is also the commander of a particular vessel, he is to be borne as part of her complement; I have requested, in a letter addressed to you a day or two since, to be informed whether Commodore Dallas was the commander of the Constellation as well as of the squadron during the period embraced by Mr. Mc. McIntosh's claim; since, if he were, the additional pay applied for cannot, under any circumstances, be granted. The letter of Mr. Mc. McIntosh, which you referred to me, is herewith returned.

I have the honor to be, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Hon. J. K. PAULDING,
Secretary of the Navy.

TREASURY DEPARTMENT,
Fourth Auditor's Office, November 29, 1838.

SIR: It would afford me great pleasure to allow your claim to increased pay while on board the Constellation, if I thought it could be done consistently with law and the regulations of the Navy Department. Upon a careful examination of the precedents in this office, however, I do not perceive that there is any case analogous to yours in which the allowance has been made; and you must certainly be in error when you suppose that you are refused what others, under the same circumstances, have received. You are also mistaken in the opinion which you appear to entertain, that the table of complements recognizes a "flag captain" to a squadron, of the force commanded by Commodore Dallas. The table does, indeed, recognize a "captain of a fleet, but it is only "when authorized by the regulations of the navy." Those regulations, since the 1st of September, 1834, confine that office to a squadron composed of at least six ships not below the rate of frigates; and, even then, the appointment requires the sanction of the Secretary of the Navy.

The cases of Commander Armstrong and Lieutenant Stribling, to which you refer, are not similar to yours. Mr. Armstrong was expressly *ordered by the department to the command* of the Macedonian, and Commodore Jones to the command of the expedition. Commodore Kennedy requested that Lieutenant Stribling might be ordered to the Peacock for the *purpose of being appointed by* him *commander* of that vessel, if he should think it necessary; and Mr. Stribling was ordered accordingly, which was construed into an implied consent by the department to his appointment, and a detaching of Commodore Kennedy, for the time, from the command of the ship. You seem to think that it is a mere point of *form* which excludes you from the increase of pay you ask; but it is not so. Even supposing Commodore Dallas to have intended, by appointing you flag captain, to make you the commander of the Constellation, your case still differs from those you have cited as precedents in two important respects:

1. The appointment never had the sanction of the department; and,

2. Commodore Dallas was himself the commander of the Constellation, and she consequently had her complement without your appointment. Upon application to the Navy Department, since I received your last letter, to know whether the commodore formed a part of the complement of the Constellation, or was borne in addition to her complement, I have been informed that he was ordered to that particular vessel, and that all the returns which have been received of the officers attached to her represent him as her captain. I believe I have already informed you that, by a rule of this office, adopted at the suggestion of the Secretary of the Navy, no officer is considered as entitled to the pay of a superior grade, unless it appears that, including himself, there was not more than a complement of officers of such superior grade on board the vessel in which the duty was performed.

I have made this explanation in the hope of satisfying you that

your claim was disallowed from a strict sense of duty, and not from want of proper consideration, much less from a disposition (as you would seem to insinuate) to make a distinction between yourself and others similarly situated; and I have only to add that, as in this case, so in all others which may come within the sphere of my official duties, it is my firm and conscientious determination to administer equal and impartial justice to the best of my ability, without the least regard to the individuals concerned.

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES MC. MCINTOSH,
United States Navy, Bridgeport, Connecticut.

TREASURY DEPARTMENT,
Fourth Auditor's Office, December 8, 1838.

SIR: The circumstances stated in your letter of the 2d instant have served to confirm me in the opinion which I previously entertained, that *your case is a hard one;* but I do not perceive that they present any ground upon which, confined as I am by law and the regulations of the Navy Department, I can afford your relief. Commodore Dallas, no doubt, supposed that he had a right to appoint you "flag captain," but in this he was mistaken, which mistake is doubtless the real source of the hardship of which you complain. Even the regulation in the "Red Book," to which you refer, did not authorize the appointment except with the sanction of the Secretary of the Navy, which, in this instance, was not given; but that regulation was long since repealed, so far as it allowed a flag captain to a squadron of less force than six frigates. I think you will agree with me, upon further reflection, that Lieutenant Stribling's case and yours are, in the main point, dissimilar. The Navy Department certainly had a right to direct that, at any period of the cruise, Lieutenant Stribling should take command of the Peacock, and that Commodore Kennedy should thenceforth command the squadron only, and to leave this period to be fixed on by the commodore. The consent of the department to such an arrangement was strongly implied by the order given to Lieutenant Stribling to join the vessel, upon the particular application made by Commodore Kennedy. But in your case no sanction, express or implied, was given to the appointment made by Commodore Dallas; on the contrary, it was expressly refused. When, in addition to this, it is considered that your appointment was one which *could not* be sanctioned by the department consistently with its own regulations, I think the difference between the two cases becomes plain and striking. I have only, therefore, to repeat my regret that an error was committed which you seem to suppose has had the effect to place you, in one respect at least, in a worse situation than others who were your juniors in the service.

In relation to your allotments, which you state were stopped on the

1st November, be pleased to inform me *where* and by what *purser* they were registered, and by what agent they were payable.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES MC. MCINTOSH,
United States Navy, Bridgeport, Ct.

TREASURY DEPARTMENT,
Fourth Auditor's Office, December 18, 1838.

SIR: Your application for increase of pay is one upon which I come to an adverse decision with so much reluctance, and the observations I have since made to you on the subject have been received with so much candor, that I am unwilling to leave you in doubt as to any of the considerations by which I felt myself forced to that determination.

In your last letter you state that you are at a loss to perceive how I could be of opinion that no sanction, express or implied, was given by the Navy Department to your appointment, when the Secretary, in a letter to Commodore Dallas, expressed his willingness that you should receive the pay of a lieutenant commanding. *I confess that this communication of the Secretary is inexplicable by me, and I can only regard it as an anomaly.* I think it very clear, however, that it was not intended as a sanction to your appointment either as *flag captain or commander of the Constellation.* In either of those cases you would have been entitled to more than the pay of a lieutenant commanding, and yet the Secretary refused to give his consent to your receiving more. This act of itself, therefore, it appears to me, shows rather his unwillingness than his willingness to sanction the appointment. But when taken in connexion with his previous declaration, that he could not sanction your appointment as "commander," and with the subsequent declaration that it had not been sanctioned, I do not see how I could attach to the circumstance the meaning and force to which you think it entitled. The more I reflect upon the subject, the more I am convinced that you have received even a larger allowance than a strict application of the law and regulations would warrant, although had I possessed an equitable discretion, I should certainly have been induced to allow you more.

I remain, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES MC. MCINTOSH,
United States Navy, Bridgeport, Ct.

TREASURY DEPARTMENT,
Fourth Auditor's Office, February 9, 1839.

SIR: I received your letter of the 3d instant. If you will turn to the printed regulations of the navy, you will see it expressly stated, that no advance is allowed to the officers on a voyage to Pensacola. I communicated your desire, however, to the Secretary of the Navy, who merely referred me to the rule on the subject.

I meant to be understood by Captain Boerum, that I believed you were convinced that *this office* had no power to grant you the increased pay for which you applied, and this I think I had a right to infer from your letter of the 11th December, in which you observe: "I dare say the views you have taken in regard to my claim are correct, and drop the subject with the department;" notwithstanding you stated, at the same time, that you were not satisfied *in regard to an anomaly of the late Secretary of the Navy, which I did not attempt to explain, and which I presume no one could explain*, but which, on that very account, could not reasonably be expected to have any influence upon my decision.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES MC. MCINTOSH,
United States Navy, Bridgeport, Ct.

TREASURY DEPARTMENT,
Fourth Auditor's Office, August 14, 1839.

SIR: In the settlement of the account of John De Bree, purser of the frigate Constellation, you have been charged on the books of this office with two hundred and four dollars and ninety-five cents, the difference between the pay of commander on "*sea service*," as paid by the purser from the 28th February to 2d September, 1838, and the pay of the same grade for the same time "*on other duty*," as allowed at this office. There is one dollar standing to your credit for balance of pay from the 1st of August to 15th September, 1827, which leaves due from you $203 95. I have therefore to request your early attention to the subject, otherwise the purser at Pensacola will be directed to check it from your pay.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES MC. MCINTOSH,
United States Navy, Pensacola.

NAVY DEPARTMENT, *November* 13, 1839.

SIR: Your letter of the 21st ultimo has been received. The decision of the Fourth Auditor, disallowing your claim to the sea pay of a commander, after your promotion to that rank, and while you were on board the Constellation with Commodore Dallas on the West India station, was concurred in by the department. For the reasons upon which it was made, you are referred to a letter from the Auditor, which was enclosed to you by the department on the 4th of December last. No new facts in the case have since been adduced, and the department cannot reconsider it.

I am, very respectfully, your obedient servant,

J. K. PAULDING.

Commander JAMES MC. MCINTOSH,
United States Navy Yard, Pensacola.

NAVY DEPARTMENT, *September* 26, 1840.

SIR: Your letter of the 31st July last was duly received. If you will again submit your claim to increased pay while on board the Constellation, the department will reconsider the decision which has been had upon it.

I am, very respectfully, your obedient servant,

J. K. PAULDING.

Commander JAMES Mc. McINTOSH,
United States Navy, New York.

TREASURY DEPARTMENT,
Fourth Auditor's Office, October 19, 1840.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, informing me that "the claim of Commander Mc. McIntosh, for pay as flag captain, while serving in that capacity on board the Constellation, under the appointment of Commodore Dallas, had been again brought to the notice of the department; that the department had lately declined allowing this claim, on the ground that, in the opinion of the accounting officers of the treasury, it could not be *legally* done; *but that it appearing that there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the department*, the claim (for pay as flag captain of the Constellation, from the 14th of August, 1837, to 3d of September, 1838,) *was allowed.*"

It has always been my desire, in conducting the business of the office committed to my care, to conform to the wishes and opinions of the Navy Department, whenever such conformity appears to me to involve no violation of the duties imposed upon me by law; and if the responsibility for the decision of this case could be legitimately transferred from this office to your department, I should readily acquiesce in the determination you have announced.

The view of the question which you have recently communicated has led me to give it a careful reconsideration; but I am of opinion that the duty and responsibility of deciding it rest upon the accounting officers of the treasury; and, from its origin, I have acted upon that conviction. It was never referred by me to the Navy Department for determination, nor did I ever suppose that I had the right so to refer it. On the contrary, the reference was from your department to this office, as appears by your letter of the 6th of October, 1838; in which you inform me that you "enclose the papers in the case of Commander Mc. McIntosh, and requested that I will pay him what the law or the regulations of the service will justify." On the 11th of ohe same month I addressed a note to Mr. Boyle, then Acting Secretary tf the Navy, requesting that in order to enable me to decide upon this claim, I might be informed whether the appointment of Commander Mc. McIntosh by Commodore Dallas, to be flag captain of the squadron under his command, was sanctioned by the department; to which I received an answer on the next day, that "the appointment of Commander Mc. McIntosh by Commodore Dallas to be flag captain was *not*

sanctioned by the Secretary of the Navy;" *and, furthermore*, that "such an officer as flag captain of any vessel of war was not recognized nor provided for, either by the old or new table of complements of the different classes of vessels of the United States navy." Being in possession of this information, and of the regulations of the Navy Department, one expressly prohibiting the appointment of a flag captain to any squadron, without the sanction of the Secretary of the Navy, and another prescribing that no flag captain should in any case be recognized, unless the squadron should consist of six ships not below the rate of frigates, I was prepared to decide upon the claim, which I accordingly proceeded to do. The decision, together with the grounds upon which it rested, was subsequently communicated to you, in compliance with a call you made upon me for a report upon the subject. As in your recent letter you treat the opinion of the "accounting officers of the treasury," that the allowance claimed by Commander Mc. McIntosh could not be *legally* made, as incorrect, and allege that "*there is in fact no law prohibiting the allowance, but a regulation only, which may be modified or dispensed with at the discretion of the department*," I beg leave to make the following observations in support of the opinion which I have heretofore expressed:

The act of Congress of March 3, 1835, entitled "An act to regulate the pay of the navy of the United States," prescribes the compensation of the various classes of officers therein mentioned, among which are commanders, or master commandants, and lieutenants; providing *that officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade, while actually so employed;* and it expressly declares that the yearly allowance provided in that act is "all the pay, compensation, and allowance, that shall be received, under any circumstances whatever, by any such officer, except for travelling expenses." During a part of the period in question Mr. Mc. McIntosh was a lieutenant, and during other part he was a commander, and he has been allowed the pay specified in the act as belonging to those classes of officers. Unless, then, it should appear that, during the time embraced by the claim, he was actually performing the duties of a grade superior to his own, by which he would be brought within the terms of the provision above cited, *I cannot be wrong in asserting that there is, in fact, a law prohibiting* the additional allowance which he claims. *The case turns upon the single question of fact whether he performed, during the period in question, the duties of a grade superior to his own.* He alleges, as the foundation of his claim, that he performed the duties of flag captain on board the Constellation, the principal vessel of the West India squadron. *The first thing necessary to make out his case was, to show that there was such a grade; for if it did not exist, he could not have performed the duties pertaining to it. Now, he not only failed to show that there was such a grade, but the Acting Secretary of the Navy expressly informed me that it did not exist;* and the regulations of the navy declared that it could not exist, in a squadron of the force of that commanded by Commodore Dallas. Besides, even if the squadron had been of sufficient size to admit of a flag captain, which it confessedly was not, the appointment could not have been made by the

commanding officer, without the sanction of the Secretary of the Navy; and, in the present case, the letter of the Acting Secretary states positively that such sanction was not given. It appears, that, after Commodore Dallas had ordered Lieutenant Mc. McIntosh to act as flag captain, he informed the department of the fact, and thus directed the purser to pay him as commander. The payment thus directed was disallowed by the Secretary, after a reference to Mr. Pickett, then Fourth Auditor, for his opinion on the subject. *This was in August*, 1837; and on the 5th of January, 1838, the Secretary *expressly* informed Commodore Dallas that he could not recognize Lieutenant Mc. McIntosh as a commander, but was willing *to regard and pay him as a lieutenant commanding,* which pay he receives. The department, therefore, instead of being silent upon the subject, actually refused to sanction the appointment of flag captain; inasmnch as the lowest compensation to which he would have been entitled in that capacity would have been the pay of a commander.

After Mr. Mc. McIntosh had been promoted to the office of commander, Commodore Dallas, in August, 1838, wrote again to the department, stating that he (Mr. Mc. McIntosh) had been retained on board the Constellation in the performance of the same duties as before, and asking how he was to be paid; *to which communication it is believed no answer was ever given, owing probably to an idea entertained by the Secretary, that his views upon the subject had been sufficiently expressed in his previous communication.*

But, had the department remained together silent, the case, in my view, would not have been altered. It must be admitted, I think, without any hesitation, that the appointment made by Commodore Dallas was, in the first instance, wholly unauthorized and illegal; for although, like other commanders on foreign stations, he had a general authority to confer acting appointments, he certainly had no power to *create* the offices to which the appointments were to be made, which he must have done in this case, inasmuch as, by the regulations of the navy then existing, a flag captain was not allowed to a squadron of the size of that which he commanded. Of an act thus done, without a shadow of authority, he had no right, from the silence of the department to infer approbation; but he was, upon correct principles, bound to infer the contrary. A *positive* order or declaration of the department, at least, was requisite to make a proceeding valid which was before invalid. The principle, so far as I am aware, has never been admitted by any jurisdiction, that an illegal act on the part of an inferior officer may be legalized by notice to his superior, and by the omission of the latter to express his disapprobation.

I think it clear, therefore, that, agreeably to the law and regulations of the department as they existed at the time the service was performed, the claim of Commander Mc. McIntosh to the pay of flag captain is not well founded. The only question remaining is, whether agreeably to an intimation contained in your letter, the assent of the department, *now* granted, gives him a better title than he before had. There is no doubt that the department had a right to modify or dispense with its own rules *prospectively, but it admits of serious question, to say the least, whether a rule can be made, altered, or repealed,* to

affect a previous transaction in which the rights of an individual, or of the government, are concerned, and thus to produce the effect of an *ex post facto* law. I do not consider it necessary, however, in the decision of this case, to determine that point; for any change at the present time, of the rules which operated to prevent Commander Mc. McIntosh from receiving the pay of flag captain, at the time when the services for which he claims were performed, would be in effect, an alteration of the act of Congress; as it would so enlarge its operation as to include, within certain of its provisions, an officer who, before such change, was avowedly excluded; a power which the legislative authorities of the country alone can exercise.

I have thus presented my views of this case somewhat at length, induced by a sense of respect and duty towards the department, for the purpose of explaining the necessity which, under the opinions I entertain upon the subject, compels me to withhold that action, on the part of this office, which may be requisite for the satisfaction of the claim; and in the hope that the reasons which led to its rejection on a former occasion, thus laid before you more fully than they have ever before been, may yet approve themselves to your own judgment; more especially as, in the case of Commander Boerum, who, under similar circumstances, applied to Congress for relief, they received the sanction of a committee of the House of Representatives.

I have the honor to be, sir, very respectfully, your obedient servant.

A. O. DAYTON.

Hon. J. K. PAULDING,
Secretary of the Navy.

U. S. COURT OF CLAIMS

JAMES Mc. McINTOSH
vs.
THE UNITED STATES.
} Supplemental argument.

Since writing our argument in the above case, (now on file in this honorable Court,) the Supreme Court of the United States has delivered an opinion (No. 24, December term, 1855,) in the case of "the United States, plaintiff in error, *vs.* Catesby Ap. Roger Jones," in which it is laid down that "the Secretary of the Navy represents the President, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers entrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments."

Here, it is expressly decided that the accounting officers cannot go behind the opinion or decision of the "head of a department." In

this case of Mc. McIntosh, the Secretary of the Navy *ordered payment to be made* to petitioner, but the Fourth Auditor refused to pay him, on the ground that there *was no law for it*. We contend that Mc. McIntosh is entitled to relief, on the order of the Secretary of the Navy, as set forth in his petition, and supported by the decision of the Supreme Court, as above.

We herewith file a copy of said decision.

BIRCHETT & DOWNING.
Counsel for Claimant.

Mc. McINTOSH *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a claim by a naval officer for compensation for the performance of the duties of an office of a higher grade than his own.

Commodore Dallas, on the 14th of August, 1837, having the command of the West India squadron, then in Pensacola bay, appointed the claimant flag captain of the squadron. The following is a copy of the appointment:

"U. S. FRIGATE CONSTELLATION,
"*Pensacola Bay, August* 14, 1837.

"SIR: You are hereby appointed flag captain of the squadron under my command, and will repair on board of the United States frigate Constellation forthwith, and assume the duties of that station. You will receive the pay of 'commander.'

"Respectfully, your obedient servant,

"A. J. DALLAS.

"Lieut. Commanding JAMES Mc. McINTOSH,
U. S. Schooner Grampus."

At the time of this appointment the claimant was a lieutenant commanding said schooner, one of the vessels of said squadron.

The claimant, on receiving said appointment, went on board the Constellation, the flag ship of the squadron, and discharged the duties of flag captain of the squadron from the date of his appointment until the 3d of September, 1838. Commodore Dallas was, during that time, captain of said frigate as well as commander of the squadron. Whilst the claimant was in the discharge of said duties, namely, on the 9th of March, 1838, he was appointed and commissioned a commander in the navy. He continued, however, by the request of the commodore, to discharge the duties of flag captain aforesaid until the said 3d of September, 1838, when the Constellation was ordered to another station.

Afterwards, on the settlement of the claimant's accounts at the treasury for his services on board the Constellation, he was allowed for part of the time, namely, from the 14th of August, 1837, until his appointment of commander, the pay of a lieutenant commanding, and for the residue of the time he received the pay of a commander on other duty than sea service.

The claimant was not satisfied with this allowance, but demanded the pay of a captain for the time he acted as flag captain as aforesaid,

which claim was refused by the Fourth Auditor of the Treasury, and, in November, 1839, the refusal was concurred in by the Secretary of the Navy.

In October, 1840, however, the Secretary of the Navy, on the application of the claimant, wrote to the Fourth Auditor, saying, "that it appearing there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the department, the claim (for pay of flag captain from the 14th of August, 1837, to the 3d of September, 1838,) was allowed."

To this letter of the Secretary the Auditor answered, that he considered the claim to be prohibited by law; that he declined acting in its favor; and that he hoped the reasons given (particularly set out in the answer) would be approved of by the Secretary.

The claim was therefore rejected at the treasury.

The claimant soon afterwards, namely, at the first session of the twenty-sixth Congress, presented his claim to the House of Representatives, and, at the next session, to both Houses of Congress. There are several reports of committees on the subject, the last of which was made by a committee of the Senate, on the 18th of February, 1850. This last report is in favor of the claimant for $204 95. But there has been no final action by Congress in the case.

The claimant has now filed his petition in this Court, making the same claim that he had previously presented at the treasury and to Congress, to wit: for the pay of a captain in the navy from the 14th of August, 1837, to the 3d of September, 1838, deducting the amount he has received as aforesaid.

This claim for compensation for extra services is founded principally on the following statutory provision:

"Officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade while actually so employed."—(4 Stat. at Large, 756)

The extra duties performed by the claimant, as before stated, were those of the office of flag captain of the aforesaid squadron.

The first inquiry to be made is, whether Commodore Dallas was entitled to a flag captain of the squadron?

We have not been referred to any act of Congress relative to this question. There are, however, some regulations on the subject, which we will proceed to notice. The first of these regulations is as follows:

"SECTION 1. Every commander of a squadron upon a foreign station is authorized to appoint a flag captain, or to select any officer to perform the duties, under the sanction of the Secretary of the Navy. The appointment without sanction is prohibited."—(Red Book of 1832.)

That regulation was adopted on the 21st of January, 1817. But the Fourth Auditor, in a report respecting this claim, speaking of said regulation, says that, "in 1834, the department declared that no such appointment, under the rule which contained that prohibition, would be recognized after the first of September of that year unless it should be agreeable to the regulations of 1818 * * * ; that is to say, that the officer making the appointment should have under his command at least four vessels of a rate not below that of a frigate."—(Sen. Com. Rep., No. 60, Feb. 18, 1850.)

There is a regulation also of the 28th of January, 1838, as follows:

"The following persons may also be borne, in addition to the complement of vessels in which the commander of a squadron is borne, namely, a captain of a fleet when authorized by the regulations of the navy," &c.

But the regulations thus referred to requires, as claimant's brief admits, that the squadron should be composed of six frigates when entitled to a captain of a fleet or flag captain.—(See claimant's brief, p. 8; Rep. of Fourth Auditor, Nov. 29, 1838.)

The following are the regulations of 1818 above referred to:

"6. A commander of a squadron having under his command six ships of a rate not below that of a frigate, and acting under separate orders from the Secretary of the Navy, shall be entitled to an officer of the rank of captain, to assist him in regulating the details of his squadron.

"7. A commodore, or a commander of a division, having under his command four ships of a rate not below that of a frigate, shall be entitled to an officer of the rank of master commandant, who shall, while performing this service, receive the pay and emoluments of a captain of a frigate of the second class."

Now, in the squadron of Commodore Dallas there was but one frigate, and no vessel of a superior grade.—(See Fourth Auditor's Report, Feb. 8, 1848.) The commodore, therefore, under the regulations of 1818, was not entitled to a flag captain of the squadron.

There is another objection to this appointment. The authority of commanders to make acting appointments is derived from the following regulation of 1818:

"On foreign stations a commander may, when absolutely necessary, give acting appointments to fill the vacancies which may be occasioned by death or other circumstances; but in such cases he shall take the earliest apportunity to make the circumstances known to the Secretary of the Navy, and state his reasons for making such acting appointments."—(14 Amer. St. Pap , 516.)

The appointment in the present case not being to fill a vacancy was unauthorized for that reason.

Whether the Secretary of the Navy could, notwithstanding the regulations of 1818, appoint a flag captain to this squadron, need not now be decided, because the Secretary did not make such appointment, nor did he sanction the appointment made by the commodore. Instead of such appointment or sanction being proved, the evidence is the other way. The commodore's appointment states that the claimant's pay would be that of a commander; but his right to such pay was denied by the Secretary in the same month in which said appointment was made. On the 14th of October, 1837, the Secretary informed Commodore Dallas that it was not in his (the Secretary's) power to make the appointment of acting commander. In answer to the commodore's letter of the 22d December, 1837, the Acting Secretary stated that the Secretary had already disapproved of the appointment. On the 5th of January, 1838, the Secretary informed the commodore that he (the Secretary) could not recognize the claimant as a commander, but that he was willing to regard and pay him as a lieutenant commanding.

On the 12th of October, 1838, the Acting Secretary wrote to the Fourth Auditor as follows:

"In reply to your letter of yesterday's date, I have to state that the appointment of Commander Mc. McIntosh by Commodore Dallas to be flag captain was not sanctioned by the Secretary of the Navy; nor is such an officer as flag captain of any vessel of war recognized or provided for either by the old or new table of complements of the different classes of vessels of the United States navy."

It may therefore be confidently said that the claimant's appointment of flag captain of said squadron was without authority and void.

We are next to inquire whether, considering the appointment void, the claimant's extra services aforesaid can entitle him to the compensation he demands?

We cannot believe that the mere discharge by an officer of the duties of a higher office than his own will entitle him to the benefit of the statutory provision before referred to. To give him a claim to the salary of the higher office, the duties of that office must have been legally performed—that is, they must have been performed by virtue of an authorized acting appointment; and the burden of proof that they were so performed is on the officer making the claim. The government ought not to be held responsible, under the statutory provision aforesaid, for services which it never authorized to be performed.

But supposing the claimant to have been a flag captain of the squadron, he was not for that reason entitled to the rank and pay of a captain or commandant of a ship; because the squadron had not the vessels necessary to bring the case within said regulations of 1818, by which alone such rank and pay were given. The following remarks of the Fourth Auditor, in his report on this subject, appear to be conclusive:

"If the appointment of Lieutenant Mc. McIntosh as flag captain, which it cannot be pretended was authorized by the regulations, was sanctioned by the Secretary of the Navy, as is contended, he certainly had the right to prescribe the grade in which the duties should be considered as performed; and as, agreeably to the regulations, where there were four frigates they would be discharged by a master commandant, he might very reasonably direct that where there was but one frigate, they should be performed by a lieutenant, and that he should receive, as he did direct in the case of Lieutenant Mc. McIntosh, only the highest pay of that grade. It is to be observed, too, that Commodore Dallas, when he made the appointment, did not suppose that he was entitled to an officer of the rank of captain to serve as his flag captain; for besides selecting a lieutenant for the purpose when there were commanders in the squadron, he directed, in the order itself, that Lieutenant Mc. McIntosh should receive the pay of a commander only, which would have been incompatible with his discharging the duties of a captain."—(Sen. Rep. No. 60, 31st Cong., 1st session.)

The claimant further contends, that if he was not flag captain of the squadron with the rank of captain, he was, at all events temporary captain of the flag ship, and was thus entitled to a captain's pay during the time he served on board of that ship as aforesaid. To

prove his appointment of temporary captain of said ship, he relies on the Secretary's letter to Commodore Dallas, of the 5th January, 1838, in which the Secretary says: "I have to inform you that, although I cannot recognize Lieutenant Mc. McIntosh as a commander, I am perfectly willing to regard and pay him as a lieutenant commanding." That letter did not confer on the claimant the temporary office of captain of the Constellation. The Secretary evidently had no such intention. Commodore Dallas was not only commander of the squadron, but he was also, by the assignment of the department, captain of the Constellation. It is not to be supposed that the Secretary ever thought of providing two captains for the same ship.

The claimant further contends that the Secretary's allowance of the claim in 1840, about two years after the services were performed, established the validity of the claim. We think otherwise. The allowance was rejected at the treasury and the payment refused. The allowance under those circumstances, is entitled to great respect, but we do not consider it conclusive.

Our opinion is, that the services performed by the claimant on board the Constellation were not performed by virtue of an office higher than his own; and that he has not, therefore, any claim on the government, under the statutory provision aforesaid, for those services. Neither has he any claim, independently of that provision, to be paid for the extra services in question; the second section of the act of 1835 expressly prohibiting such payment. That section says "that no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills," &c.; and it expressly declares "that the yearly allowance provided in this act is all the pay, compensation, and allowance that shall be received, under any circumstances whatever, by any such officer or person, except for travelling expenses," &c.—(4 Stat. at Large, 757.)

We think, however, that the claimant is entitled to the sum of 204 dollars and 95 cents, which is the difference between the sum paid to him at the treasury as commander "on other duty," and that which was due to him as such officer "attached to a vessel for sea service." See report of Fourth Auditor attached to Senate Com. report No, 60, 31st Cong, 1st ses.; which reports are among the papers in this cause.

We report a bill in favor of the claimant for said sum of 204 dollars and 95 cents.

A BILL for the relief of Captain James Mc. McIntosh of the United States navy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Captain James Mc. McIntosh, of the United States navy, the sum of two hundred and four dollars and ninety-five cents, being the difference between the sum paid to him at the treasury as commander "on other duty," and that which was due to him as such officer "attached to a vessel for sea service," and being in full for his service as an officer of the West India squadron from the 14th day of August, 1837, to the 3d day of September, 1838.

35TH CONGRESS, 1st Session. } SENATE. { Mis. Doc. No. 20.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee of Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CHARNER T. SCAIFE, ADMINISTRATOR OF GILBERT STALKER, DECEASED, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents from the War Department, transmitted to the Senate.
3. Letters of administration filed in the case and transmitted to the Senate.
4. Documents referred to in the opinion of the Court and transmitted to the Senate.
5. Statement of J. D. McPherson, esq., by agreement admitted as evidence, transmitted to the Senate.
6. Claimant's brief.
7. Opinion of the Court.
8. Bill for the relief of claimant.
9. Other documents received from the Senate in this case are returned to the Senate.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

CHARNER T. SCAIFE,
vs.
UNITED STATES.

To the honorable the judges of the Court of Claims:

Charner T. Scaife, a citizen of the State of South Carolina, respectfully represents, that in the year 1839 Gilbert Stalker and N. B. Hill were the owners, as partners, of a certain steamboat called the "James Adams," worth at least the sum of $30,000. That during the Seminole war, which was conducted on the part of the United States by the late General Worth, the said boat was chartered to the government at the rate of $2,500 per month. That subsequently, to wit: on the 28th of April, 1841, a new charter was entered into at the rate of $2,000 per month. This charter is to be found in the file of papers referred to this Court by the Senate. That at the time of entering into this charter it was never contemplated that the said boat was to be exposed to any other risks than the acts of the enemy, and such as belong to the use of said boat in waters fitted for the purposes of navigation by such a vessel. That after a few months' service under this contract, it was determined by General Worth to employ the boat in the navigation of Pease creek and the Upper Colorouhatchie. The distance these streams were to be ascended made it certain that the "James Adams" could not be used for this purpose without incurring great damage, if not destruction. The streams were shallow, tortuous, and overhung with oaks and other trees. These were not the risks and dangers which the owners of the boat undertook to incur. The compensation was also inadequate, and the general in command was informed that the boat would not incur them. General Worth, deeming the exigencies of the service demanded it, agreed with Stalker, that if he would continue the boat in service she should receive an additional compensation of $500 per month; and on this express agreement the boat continued the service, and in doing so received great damage. For the evidence of this contract, your petitioner refers to the correspondence between the Hon. William C. Preston, then senator from South Carolina, and E. A. Ogden, assistant quartermaster with General Worth, hereto appended and made part of the petition. This contract was entered into on the 1st of August, 1841, and continued to the 28th of September, as he is informed. He states, however, it is asserted that the accounts at the department show that the boat was paid off and discharged on the 9th of July, 1842.

Your petitioner further shows, that at a subsequent period, to wit, on the 18th of September, 1842, a new charter was entered into for the said boat, and that on the 5th of October, while lying at anchor at Cedar Keys and made fast at that place, the said boat was lost in a gale of wind, owing to the government wharf giving way, it being in a defective and rotten condition. That the said Stalker was advised that the government was liable for the loss thus occasioned, as an individual would be, and immediately presented his claim to Congress for the whole loss, expecting thus to receive all he was entitled to. This claim was reported on adversely in the House of Representatives

on the 29th of December, 1843, 28th Congress, 1st session, No. 1; the report denying the liability of the government on this ground. That subsequently to this the said Stalker died, to wit, on the —— day of ———, 18—, and that N. B. Hill, as survivor and administrator, petitioned Congress for the additional remuneration stipulated by General Worth. On this petition a favorable report was made in the Senate by Mr. Mason, on the 23d of January, 1849, No. 261, Bill No. 397, 30th Congress, 2d session, and an adverse report was made in the House, No. 498, 31st Congress, 1st session.

Your petitioner further shows that subsequent to this period the said Hill died, to wit, on the 2d day of December, 1854, and that letters of administration have been granted to him by the ordinary of Richland district, in said State, the place of Hill's domicil at the period of his death.

Your petitioner further states that no part of the said claim has been assigned away to others, and that the whole amount, together with the interest due thereon, is justly due to him.

P. PHILLIPS,
Solicitor for Petitioner.

Personally appeared ——— ——— before me, ——— ———, who, being duly sworn, says that the facts set forth in the above petition are true to the best of his knowledge.

[Extract.]

ADJUTANT GENERAL'S OFFICE,
Washington, May 20, 1841.

[GENERAL ORDERS No. 29.]

* * * * * * * *

2. Colonel Worth, of the 8th infantry, the officer next in rank with the troops in that quarter, will relieve General Armistead, and assume the command of the army of Florida, and he will adopt all efficient and proper measures necessary for the speedy termination of hostilities, as well as to afford the most perfect protection and security to the frontier, and to such citizens as may be disposed to penetrate the country for lawful purposes of trade or settlement.

* * * * * * * *

By order of Alexander Macomb, major general commanding in chief.

R. JONES,
Adjutant General.

ADJUTANT GENERAL'S OFFICE,
Washington, April 16, 1856.

I certify that the foregoing is a true extract from the original on record in this office.

S. COOPER,
Adjutant General U. S. Army.

Charter of the steamboat James Adams. Major Charles Thomas, quartermaster, with G. Stalker.

FORT BROOKE, *East Florida*, *April* 28, 1841.

This charter party, indented, made, concluded, and agreed upon at Fort Brooke, East Florida, the twenty-eighth day of April, in the year one thousand eight hundred and forty-one, between Major Charles Thomas, quartermaster United States army, for and in behalf of the United States of America of the first part, and Gilbert Stalker, owner of the steamboat James Adams, of the second part, witnesseth: That the party of the second part, for and in consideration of the promises and agreements hereinafter made by the party of the first part, hath granted and letten, and by these presents doth charter, grant, and let the steamboat "James Adams" to the party of the first part, to be used and navigated in the service and for the benefit of the United States, for one month from the date of this agreement, and for as much longer period as may be required by the party of the first part; and the said G. Stalker doth also promise, covenant, grant, and agree to and with the said Major Charles Thomas and his assigns, for and in behalf of the United States, that the said steamboat shall, at all times, be subject to the control and orders of the officers of the quartermaster's department of the army of the United States, and receive on board all such persons and articles, and proceed with the greatest possible despatch to all such practicable places as they or any of them may direct; and further, that the said boat, while employed in the service of the United States, shall at all times be at the proper cost and charges, with the exception hereinafter made, of the said party of the second part, and shall be, in all things, kept staunch and strong and ready for service; and shall be well furnished and provided with an experienced and efficient commander, mate, pilot, engineer, and, at least, five deck hands and other men necessary for the navigation and good management of said boat, and with all manner of rigging, boats, apparel, good cabin furniture for the accommodation of officers, and other appurtenances fitting and necessary to the said steamboat while she is employed by the United States. And it is further distinctly understood and agreed upon that commissioned officers of the army, travelling under orders, be furnished with a cabin passage, with all the privileges and allowances to cabin passengers on board steamboats on the western rivers.

In consideration of the true and faithful performance of the above, the said party of the first part, for and in behalf of the United States, doth covenant, promise, and agree to and with the said Gilbert Stalker, his executors, administrators, and assigns, that the said United States shall and will, well and truly pay, or cause to be paid, unto the said Gilbert Stalker, his executors, administrators, or assigns, at the rate of two thousand dollars per month for the time the said boat shall be employed in the service of the United States; and said party of the first part further agrees to furnish said steamboat with the necessary fuel for running her, and to supply an army ration and a half for each officer and man employed on board of her. And it is

further understood and agreed by the parties to this contract that the party of the first part shall furnish to the commander of said boat such sums as may be necessary for her expenses, for the payment whereof the receipt of the commander shall be a sufficient voucher, and the amount shall be deducted from the sum to be paid to the owner of the boat.

In witness, &c.

CHARLES THOMAS, [SEAL.]
Major and Quartermaster.
G. STALKER. [SEAL.]

Witness: THOMAS J. HART.

Charter of Steamboat James Adams. Capt. J. M. Hill, Assist. Quartermaster, with James Hart.

CEDAR KEYS, EAST FLORIDA,
September 28, 1842.

This charter party, indented, made, concluded, and agreed upon at Cedar Keys, East Florida, this twenty-eighth day of September, in the year one thousand eight hundred and forty-two, between Captain J. M. Hill, quartermaster, United States army, for and in behalf of the United States of America of the first part, and James Hart, agent and commander of the steamboat "James Adams" of the second part, witnesseth: That the party of the second part for and in consideration of the promises and agreements hereinafter made by the party of the first part, hath granted and letten, and by these presents doth charter, grant, and let the steamboat "James Adams" to the party of the first part, to be used and navigated in the service and for the benefit of the United States for one month from and including the date of this agreement, and for as much longer period as may be required by the party of the first part; and the said James Hart doth also promise, covenant, grant, and agree to and with the said Captain J. M. Hill, and his assigns, for and in behalf of the United States, that the said steamboat shall at all times be subject to the control and orders of the officers of the quartermaster's department of the army of the United States, and receive on board all such persons and articles, and proceed with the greatest possible despatch to all such practicable places as they or any of them may direct. And further, that the said boat, while employed in the service of the United States, shall at all times be at the proper cost and charges (with the exception hereinafter made) of the second party of the second part, and shall be in all things kept staunch and strong and ready for service, and shall be well furnished and provided with an experienced and efficient commander, mate, pilot, first and second engineer, cook, steward, and at least five deck hands and other men necessary for the navigation and good management of said boat, and with all manner of rigging, boats, apparel, good cabin furniture for the accommodation of officers, and other appurtenances fitting and necessary for the said steamboat

while she is employed by the United States; and it is further distinctly understood and agreed upon, that commissioned officers of the army, travelling under orders, shall be furnished with cabin passage and fare without any extra charge to them or to the United States. In consideration of the true and faithful performance of the above, the said party of the first part, for and in behalf of the United States, doth covenant, promise, and agree to and with the said James Hart, his executors, administrators, and assigns, that the said United States shall and will, well and truly pay, or cause to be paid unto the said James Hart, his executors, administrators, and assigns, at the rate of eighteen hundred dollars per month, for the time said boat shall be employed in the service of the United States; and said party of the first part further agrees to furnish said steamboat with the necessary fuel for running her, and to supply an army ration and a half for each officer and man employed on board of her, it being, at the same time, understood by the parties to this instrument, that no whiskey is to be issued to the officers or crew, and that the agent is to pay all expenses for pilotage, &c., at any seaport town to which the said steamboat may be sent.

And it is further understood and agreed by the parties to this contract, that the party of the first part shall furnish to the commander of said boat such sums as may be necessary for her expenses, for the payment whereof the receipt of the commander shall be sufficient voucher, and the amount shall be deducted from the sum to be paid to the agent of the boat.

In witness whereof, the parties hereunto have set their hands and seals, in quadruplicate, the day and year above written.

J. M. HILL, [SEAL.]
Captain and Assistant Quartermaster.
JAMES HART, [SEAL.]
Agent.

Witnesses: GEO. M. BARNES,
D. McDONALD.

MOUTH OF THE RIO GRANDE,
January 28, 1847.

GENERAL: I recollect very distinctly that you promised Mr. Stalker at Tampa Bay the increase of $500 per month he speaks of, for the services of his steamer the "James Adams," or, in other words, you promised him the renewal of the compensation provided for in his original charter. I cannot now remember the date of this promise, but think it was made just before your expedition to Pease creek, and was based upon the destructive nature of the service required of the boat on that river and on the Carlosahatchee. No formal order was, however, given for the change of pay, and on settling with Mr. Stalker I was compelled to adhere to the terms of my own contract with him at $2,000 per month.

It was a losing business for Stalker, whose boat was finally lost

altogether at Cedar Keys, and with it, I believe, the last relic of his fortune and the last source of income. The old man was indeed terribly prosy, but was honest and unfortunate, and a good word from you would not only be just and generous, but undoubtedly, in the present case, the valuable basis of timely relief.

I am, general, very truly, yours,

E. A. OGDEN.

General W. J. WORTH,
U. S. Army, Palo Alto.

I have distinct recollection of the circumstances set forth by Captain Ogden in respect to the charter of the steamer James Adams, and of my assurance to Mr. Stalker that if he continued the vessel in the public service, to which the vessel was at that time indispensable, he should be paid an amount equal to his original contract, and until the subject was brought to my knowledge as above, I had supposed my promise, as commander, known to Captain Ogden, quartermaster, had been fulfilled.

W. J. WORTH.

Originals, in petition, presented to the Senate.

Copy of letter from Captain E. A. Ogden.

CINCINNATI, *January* 4, 1849.

DEAR SIR: I have duly received your communication of the 29th ultimo, and regret to learn from it that you have been unsuccessful in prosecuting the claim of Mr. Stalker's personal representatives for the services of his steamboat in Florida. The promise of General Worth to Mr. Stalker, which I mentioned in my letter of the 11th of August, was predicated upon the unusually severe and destructive service required of the boat; and General Worth intended, I think, to accomplish his promise by directing me to make a new charter. The want of other steamers suited to our purposes, and the exigencies of the service at the time, rendered it necessary to run the James Adams so constantly, that I remember stating to General Worth, on one occasion that his orders had not permitted the boilers of the boat to cool for twenty-five days. Part of the time mentioned in my letter of the 11th of August it was found necessary to employ the steamer on the upper Colorouhatchie river, where, in a narrow, tortuous stream, and overhanging live-oaks, the boat received great injuries. The service demanded of the boat during the last five months of 1841 left it in such a condition that Mr. Stalker quite abandoned the idea of undertaking to repair the boat or refitting her, after being discharged, for any commercial purpose. In December, 1840, when I chartered the James Adams, it was in fine condition, having just arrived from a northern ship yard, and the boat was then appraised, I think, at $30,000. A year afterwards, I am satisfied, it could not have been sold for $10,000. The rapid deterioration of the steamer

from the *unusual* service required of it, the promise of General Worth of an increased payment on that account, and the fact that Mr. Stalker would certainly have withdrawn his boat from the service if he had not expected the increase, make the payment of the claim, within the dates indicated in my letter of the 11th of August, a matter of common justice and good faith.

Very respectfully, your obedient servant,

E. A. OGDEN,
Assistant Quartermaster.

Hon. WADDY THOMPSON,
Washington, D. C.

Scaife, administrator of Stalker—Brief of claim, &c.

C. T. SCAIFE, administrator.
N. B. HILL,
vs.
UNITED STATES.
} Court of Claims.

Gilbert Stalker, the owner of the James Adams, (steamer,) on April 28, 1841, entered into a contract for the use of his boat with Major Thomas, quartermaster United States army, for one month, at $2,000, "and for as much longer period as may be required by the party of the first part." The boat continued in service under the contract until she was discharged on the 9th of July, 1842. She was again rechartered on the 28th of September, 1842, at the rate of $1,800 per month.

The demand has been paid under the charter of 28th April, 1841, at the rate of $2,000, and the present claim is founded upon the agreement with General Worth, made on the 1st of August, 1841, that he would allow the additional sum of $500 per month if the claimant would agree to continue his boat in the service. That this agreement was in fact made there is no dispute. The written statement of General Worth fully establishes it; and this is confirmed by the letters of Captain Ogden. It is denied, however, that this promise, made in good faith by the commanding general, and received and acted on in good faith by the party whose claim is now presented, is binding on the government.

1st. Because the claimant was at the time under legal obligation to perform the services for which the promise was made, and the promise was therefore *nudum pactum.*

2d. Because General Worth never reported the said promise to the proper department, where it should have been registered.

In relation to the first objection, it will be found that the charter was for one month, at $2,000. The additional stipulation for as much longer period as may be required by the party of the first part is not binding upon the claimant for want of mutuality.

If, after serving one month, the party had refused to continue, the government could not have maintained an action grounded on the refusal. The claimant could not have insisted upon his employment

for more than one month, and the government could not have insisted on his services beyond that period.

Burnett *vs.* Briscoe, 1 Johns. Rep. 236.

U. & S. R. R. Co.; Brinckerhoff, 21 Wend. Rep. 141.

Hill *vs.* Roderick, 4 Watts & Serg't, 221.

The second objection is the one relied on in the adverse Rep. No. 498, 31st Cong., 1st sess., H. Rep., and is stated in said report thus: "Whatever may have been the original intention of General Worth, it is certain that, from some reason not explained, he did not issue an order directing such increase, but left Florida without doing so." "This of itself shows the claim to be without legal foundation."

It will be seen from General Worth's letter that, until this matter was called to his attention, he supposed that his "promise as commander, known to Captain Ogden, quartermaster, had been fulfilled."

Captain Ogden says, "no formal order was, however, given for the change of pay, and in settling with Mr. Stalker I was compelled to adhere to the terms of my own contract with him." Captain Ogden further states that he left Florida on the 17th of February, 1842.

Whether General Worth did or did not report the agreement to the department can have no effect upon the rights of the claimant. The agreement was valid and binding when the promise was made, and the performance of the services under it completed the right of claimant to the compensation stipulated.—(Porte *vs.* United States)

There is no law which forbids a commanding general in time of war from entering into such contracts, and in the very nature of things such contracts could not depend for validity upon the ratification of any other branch of the service or any department of the government.

To deny what was justly due, on the ground that the general had failed to comply with an orderly and regular discharge of *his* duty, would be to punish the innocent for the fault of the guilty, and for a matter over which he could exercise no control.

But the case is presented in a still stronger attitude. Supposing the contract of charter to be a continuing one, determinable at the pleasure of the government, and still in force when the promise was made, yet the reasonable interpretation of the charter would only compel the use of the boat on such waters as were fitted for the navigation of boats of her size and quality. If the officers of the government had been solely entrusted with her navigation, and had lost her by running her on streams not suited for her navigation, and where the dangers of loss must have been anticipated, there could be no doubt the government would have been answerable, although the contract is silent upon the character of the navigation.

The rule is well settled that on the construction of contracts reference must be had to the character of the subject matter, and the use to which it is ordinarily applied, in order to arrive at the true intention of the parties.

The evidence shows that the agreement of General Worth was founded on the extra hazardous enterprises in which he desired the boat to engage. In Captain Ogden's letter, 28th January, 1847, he says to General Worth, the promise "was made just before your expedition to Pease creek, and was based upon the *destructive nature of*

the service required on that river and on the Colorouhatchie." Again, in his letter of 4th of January, 1849, he says, the agreement "was predicated upon the *unusually* severe and destructive service required of the boat, and General Worth intended, I think, to accomplish his promise by directing me to make a new charter." This letter shows the extraordinary services required of this boat. Again he says, "part of the time it was found necessary to employ the steamer on the upper Colorouhatchie river, where, in a narrow tortuous stream and overhanging live-oaks, the boat received great injuries," &c.

It cannot be denied that this extra hazardous service, one not contemplated by the charter, afforded a sufficient consideration for the new agreement, even if the first objection is admitted to be good. In the letter of General Jesup of 1st April, 1850, addressed to Mr. Underwood, he says: "General Worth had no right to change the terms of the contract, unless a different and greater amount of service was required than the contractor was bound to perform. *There might have been circumstances of extreme exposure and peril* which the boat might have been subjected to, not contemplated at the time of the charter, which would have justified the commanding officer in allowing almost any increase of compensation. In that event the circumstances should be so clearly shown as not to admit of doubt."

If the commanding general had the power to enter into a new agreement when the nature of the service required the exposure of the boat to "extreme exposure and peril," it is evident that the circumstances which gave rise to this contingency were to be judged of by the commander under his responsibility to the government.

The presumption of law is, that public officers properly perform their duties and exercise the discretion vested in them until the contrary appears. In this case we not only have the presumption of law, but the positive evidence of Quartermaster Ogden that the contingency in which it is admitted the general might act existed in this case, and was the foundation of the agreement, and there is not a particle of evidence offered by the government to rebut either the presumption or positive evidence.

The deposition of Mr. McPherson, the solicitor of the court, exhibits the character of General Worth and Captain Ogden, and illustrates the accurate business habits of the latter.

With the evidence thus drawn from the officers and agents of the United States, and in the absence of all proof on the part of the government to shake its correctness, the allegations of the petition must be considered as fully proved.

It is admitted that the party has recovered the amount due under the written contract; but this does not discharge the government under the verbal contract.—(Chase *vs.* United States. Wood *vs.* United States.)

In the straight forward and manly report of Senator Mason, No. 216, January 23, 1849, 30th Congress, 2d session, he says: "The case thus being clearly made out, that he remained in service under an express contract with the commanding officer at an increased rate during the period aforesaid, which has not been paid to him, the committee are of opinion that he remains to that extent a creditor of the government, and report a bill accordingly."

This claim was originally presented for compensation for the value of the boat, which was lost by the insufficient security of the government wharf to which she was attached. The liability of the government having been denied, the claim in its present shape was made. The parties were early, and have been persistent in the prosecution of their rights, and it would seem to be full time that the good faith of the government should now be vindicated in the discharge of so clear a liability.

P. PHILLIPS,
Solicitor for Claimant.

IN THE COURT OF CLAIMS.

SCAIF, ADMINISTRATOR OF STALKER,

vs.

THE UNITED STATES.

Opinion of the court delivered by Judge BLACKFORD.

This is a claim for a certain sum alleged to be due the estate of Gilbert Stalker, deceased, for certain service of the steamboat James Adams, of which Mr. Stalker was the owner.

The boat was, on the 29th of December, 1840, chartered for the United States, by Captain Ogden, quartermaster, at $2,500 a month. The service of the boat under the charter party was in the Seminole war, on the west side of Florida. The boat was discharged on the 26th of April, 1841.

On the 28th of April, 1841, the same boat was chartered on the part of the United States, by Major Thomas, quartermaster, at $2,000 a month, and was in service on the west side of Florida, in the war with the Seminoles, until the 9th of July, 1842, when she was discharged.

On the 28th of September, 1842, Captain Hill, quartermaster, chartered said boat for the United States, at $1,800 a month, for a service similar to that above mentioned.

We have not been furnished with the charter party of the 29th of December, 1840. By the others, copies of which are before us, the boat was chartered for one month, and as much longer as might be required by the United States.

The amount chargeable to the United States for the service of the boat under those three charter parties, has been long since paid. But the claimant alleges that his intestate, Stalker, is entitled to $500 a month for the service of said boat from the 1st of August, 1841, to the 9th of July, 1842, in addition to the $2,000 a month received by him under the charter-party of the 28th of April, 1841.

This claim for additional pay is founded on a promise made by General Worth, who was the commanding officer, to Mr. Stalker, the owner of the boat, about the 1st of August, 1841.

The promise which was made whilst the boat was in service under the contract of the 28th of April, 1841, is proved by the letters of General Worth and Captain Ogden.

The letter of Captain Ogden of the 28th of January, 1847, to General Worth, says:

"I recollect very distinctly that you promised Mr. Stalker, at Tampa bay, the increase of $500 per month he speaks of, for the services of his steamer, James Adams; or, in other words, you promised him the renewal of the compensation provided for in his original charter. I cannot now recollect the date of the promise, but think it was made just before your expedition to Pease creek, and was based upon the destructive nature of the service required on that river, and on the Colorouhatchie. No formal order was, however, given for the change of pay; and in settling with Mr. Stalker, I was compelled to adhere to the terms of my own contract with him, at $2,000 per month."

To that letter General Worth answered as follows:

"I have distinct recollection of the circumstances set forth by Captain Ogden in respect to the charter of the steamer James Adams, and of my assurance to Mr. Stalker that, if he continued the vessel in the public service, to which the vessel was at that time indispensable, he should be paid an amount equal to his original contract; and until the subject was brought to my knowledge as above, I had supposed my promise as commander, known to Captain Ogden, quartermaster, had been fulfilled."

The letter of Captain Ogden, assistant quartermaster, of January 4, 1849, to Mr. Thompson, says:

"The promise of General Worth to Mr. Stalker, which I mentioned in my letter of the 11th of August, was predicated upon the unusually severe and destructive service required of the boat, and General Worth intended, I think, to accomplish his promise by directing me to make a new charter. The want of other steamers suited to our purposes, and the exigencies of the service at the time, rendered it necessary to run the James Adams so constantly that I remember stating to General Worth, on one occasion, that his orders had not permitted the boilers of the boat to cool for twenty-five days. Part of the time mentioned in my letter of the 11th of August it was found necessary to employ the steamer on the Upper Colorouhatchie river, where, in a narrow tortuous stream and overhanging live-oaks, the boat received great injuries. The service demanded of the boat during the last five months of 1841 left it in such a condition that Mr. Stalker quite abandoned the idea of undertaking to repair the boat or refitting her, after being discharged, for any commercial purpose. In December, 1840, when I chartered the James Adams, it was in fine condition, having just arrived from a northern ship yard, and the boat was then appraised, I think, at $30,000. A year afterwards, I am satisfied, it could not have been sold for $10,000. The rapid deterioration of the steamer, from the unusual service required of it, the promise of General Worth of an increased payment on that account, and the fact that Mr. Stalker would certainly have withdrawn his boat from the service if he had not expected the increase, make the payment of

the claim, within the dates indicated in my letter of the 11th of August, a matter of common justice and good faith."

This claim has been before both Houses of Congress. The Committee of Claims of the Senate, at the second session of the thirtieth Congress, reported in favor of the claim. A similar committee, at the first session of the thirty-first Congress, to which committee the Quartermaster General made a report unfavorable to the claim, reported to the Senate against the claim, and the report was concurred in. The Committee of Claims of the House of Representatives, at the first session of the thirty-first Congress, reported against the claim, and the report was laid on the table.

Upon the best consideration we have been able to give the case, we have come to the conclusion that the claimant is entitled to recover. As the service, to procure which the promise was made, was not required by the charter party of the 28th of April, 1841, it cannot be said that the promise was without consideration. Neither can it be said that the promise was made without authority, it having been made by the commanding officer in the presence of the quartermaster. It would, no doubt, have been more regular, if the general had caused a new charter party to be executed; but still,as the unusual service was performed in consequence of the promise, it seems to be proper that the government should pay for it.

The charge for the service, from the time of the promise to that of the discharge of the boat, is $5,645 16, for which sum we report a bill.

A BILL for the relief of Charner T. Scaife, administrator of Gilbert Stalker.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Charner T. Scaife, administrator of Gilbert Stalker, deceased, five thousand six hundred and forty-five dollars and sixteen cents in full for the use and service of the steamboat James Adams, belonging to said Stalker, from the 1st day of August, 1841, to the 9th day of July, 1842.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 21.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee of Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

NEAL SMITH, ADMINISTRATOR OF WM. TURVIN,

vs.

THE UNITED STATES.

1. The petition of the claimant.
2. Documents received from the House of Representatives and exhibited as evidence in the case, returned to that House.
3. Letter of the acting Commissioner of the General Land Office to Hon. P. Phillips, transmitted to the House of Representatives.
4. Claimant's brief.
5. Opinion of the Court.
6. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

NEAL SMITH, Administrator of WILLIAM TURVIN,
vs.
UNITED STATES.

To the Honorable the Judges of the Court of Claims:

The petition of Neal Smith respectfully represents, that on the 3d of June, 1856, he was duly appointed administrator on the estate of William Turvin, by the probate judge of Baldwin county, State of Alabama; that the said Turvin died in the said county and State some time in the year 1810.

Your petitioner shows that the said William Turvin, in his lifetime, was the possessor of a concession founded on an order of survey granted by Vincent Folch, the survey being of same date and signed by Stephen Miro, of certain premises on the east side of Mobile Bay, in the county of Baldwin, lying to the west of Bayou Pascual, south of 31 degrees, townships one and two south, range two, east of the basis meridian, containing 120 arpents in front, with the ordinary depth of 40 arpents. That under the concession and survey in favor of one Samuel Moore, the said Moore was put in possession, which was afterwards conveyed to the said Turvin by deed, November 7, 1791.

That the said Turvin was also possessed of another concession, adjoining to Moore's, granted by Juan Francisco Armand de Courville, on the 19th of September, 1806, of 12 arpents by 40 deep, of which he was also put in possession.

That after the change of flag, and when the board of land commissioners was established, the said Turvin being then dead, the said claims were presented for confirmation by one James Conway, acting as agent of the estate, to wit, on the 19th of June, 1813. The title papers alone were presented, and the board refused to recommend the claim for confirmation, no proof having been made of inhabitation and cultivation.

Your petitioner subsequently renewed the application under the 3d section of the act of 1829, when he made proof of inhabitation and cultivation of the said premises, from 1781 to 1810, the year of William Turvin's death, and the possession of the heirs to 1835, when the claim was reported for confirmation and confirmed by Congress.

Your petitioner shows that the said premises were sold and patented by the government of the United States to third persons, by reason whereof the said Turvin's estate has lost the said lands, notwithstanding said titles.

Your petitioner further represents, that a claim for relief was presented to the Senate, 25th Congress, second session; but no action was had thereon until the 33d Congress, when a report, No. 352, was made, accompanied by Bill 439, from the Senate; that the said bill was sent to the House, where no action was had other than a reference to this honorable Court.

Your petitioner shows that no assignment has been made of any interest in this claim to any person whatever, but that the legal representative of said William Turvin is sole owner thereof.

Your petitioner asks leave to refer to certified copies of the proceedings of the Land Office for proof of the facts herein set forth, and prays that a bill be reported paying to him a sum equivalent to $1 25 per acre for the land so claimed by him, or for such other relief as may be consistent with the principles of equity and justice.

P. PHILLIPS,
Solicitor for Petitioner.

Personally appeared ——— before me ——— who being duly sworn, says that the facts set forth in the above petition are true to the best of his knowledge.

HEIRS OF WILLIAM TURVIN.

In this case the petition states that the title in question was *confirmed* by Congress. This is a mistake which the solicitor who drafted the petition fell into by copying the statement made in the petition of the administrator presented to the Senate, and the petition in this Court must be amended in that particular.

Application for a confirmation was first made by James Conway on the 19th June, 1813, before the commissioner on land claims, when the titles derived from the Spanish government were presented, but no proof being then made of inhabitation and cultivation, the claim was rejected.

Under the 3d section of act of March 2, 1829, to wit: in 1830 Neal Smith, the administrator and present petitioner, renewed the application, and made the proof of inhabitation and cultivation required by said action; and on the 16th April, 1836, the register and receiver made a report for the 960 arpens claimed, concluding thus: "The foregoing claim appearing to the undersigned to be supported agreeably to the 3d section of the act before recited, under which the heirs of William Turvin, sr., deceased, now claim, respectfully beg leave to express their opinion that the said claim ought to be confirmed."

The claimant was thus armed with a Spanish title, and proof of inhabitation and cultivation the period required by the act of Congress, and a recommendation for confirmation by the board organized for that purpose, whose reports have been uniformly acquiesced in by Congress. This report being a special one, has, by neglect, never been confirmed, and a petition to value the claim was made to the Senate at the 2d session of the 25th Congress, and there continued until the bill was passed, which, together with the report, are hereto annexed. The bill was sent to the House, when it was referred to the Court of Claims. This claim for confimation, therefore, stands upon the treaty obligation which bound this government in good faith to perfect the inchoate titles, which were founded in justice, so that the change of government should work no injury to the inhabitants.

The term "property," says the Supreme Court of the United States, "as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in con-

tract, those which are executory, as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."—(Soulard *et al. vs.* The United States, 4 Peters, 512.)

This claim is also sustained by the *proviso* which is contained in the act of 1829, and if the application and proof had been made in time for the general report made under that act it would have been then confirmed. I know of no case in which Congress has ever refused a confirmation when recommended by the board to which the investigation of the claim has been submitted.

The whole history of governmental action in reference to these land claims sustains the report of Mr. Pettit, of the Senate committee. As an illustration of this action, I refer the court to the cases of Gilbert Hodges and Henry Masters, (vol. 6 Stats. U. S., 580,) and to the case of McCabe's executors, at the last session, the report of which is based upon, and refers to, the decision of Soulard *vs.* The United States, 10 Peters, 100, the land covered by this claim having been otherwise disposed of by the United States, as will be seen by the letter from the Commissioner of the General Land Office, and as stated in Mr. Petit's report.

I ask that a bill such as was passed by the Senate in this case be reported for the action of Congress.

P. PHILLIPS,
Solicitor for Neal Smith, adm'r of Wm. Turvin.

IN THE COURT OF CLAIMS.

NEAL SMITH, ADMINISTRATOR OF WILLIAM TURVIN,

vs.

THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner states the following case: On the 3d of June, A. D. 1856, the petitioner was appointed the administrator of William Turvin by the probate judge of Baldwin county, in the State of Alabama. Turvin died some time in the year 1810.

William Turvin, in his lifetime, was the possessor of a concession, founded on an order of survey granted by Vincent Folch, (the survey being of same date, and signed by Stephen Miro,) of certain premises on the east side of Mobile bay, in the county of Baldwin, lying to the west of Bayou Pascual, south of 31st degree, townships one and two south, range two east, of the basis meridian, containing one hundred and twenty arpents in front, with the ordinary depth of forty arpents. Under the concession and survey in favor of one Samuel

Moore, Moore was put in possession; which was afterwards conveyed to Turvin by deed, November 7, 1791.

Turvin was also possessed of another concession, adjoining Moore's, granted by Juan Francisco Armand de Courville, on the 19th of September, A. D. 1806, of twelve arpents by forty deep; of which he was also put in possession.

After the change of flag, and when the board of land commissioners was established, Turvin being then dead, the claims were presented for confirmation by one James Conway, acting as agent of the estate, on the 19th of June, A. D. 1813. The title papers alone were presented, and the board refused to recommend the claim for confirmation, no proof having been made of inhabitation and cultivation.

The petitioner subsequently renewed the application under the third section of the act of 1829, when he made proof of inhabitation and cultivation of the premises from 1781 to 1810, the year of William Turvin's death, and the possession of the heirs to 1835, when the claim was reported for confirmation.

The premises were sold and patented by the government of the United States to third persons; by reason whereof Turvin's estate has lost the lands, notwithstanding his titles.

A claim for relief was presented to the Senate, 25th Congress, second session; but no action was had thereon till the 33d Congress, when a report (No. 352) was made, accompanied by a bill (439) from the Senate. The bill was sent to the House, where no action was had other than a reference to this Court.

He prays that a bill be reported paying to him a sum equivalent to $1 25 per acre for the land claimed by him, or for such other relief as may be consistent with the principles of equity and justice.

The third section of the act approved March 2, A. D. 1829, is as follows: "Every person or persons, or the legal representatives of such person or persons, who, on the fifteenth day of April, one thousand eight hundred and thirteen, had, for ten consecutive years prior to that day, been in possession of a tract of land not claimed by any other person, and not exceeding the quantity contained in one league square, and who were on that day resident in that part of Louisiana situated east of Pearl river and west of the Perdido, and below the thirty-first degree of north latitude, and had still possession of such tract of land, shall be authorized to file their claim, in the manner required in other cases, before the said register and receiver at St. Stephens, for their decision thereon. And it shall be the duty of the said register and receiver to hear and record the evidence offered to support such claim; and if the same shall be established by sufficient proof, agreeably to the provisions of this section, the said officers shall in their report recommend the confirmation of the right to such claim, as in other cases: *Provided*, That no more land shall be reported for confirmation, by virtue of this section, than is actually claimed by the party, or than is contained within the acknowledged and ascertained boundaries of the tract claimed; nor shall the provision of this section authorize the confirmation of any land heretofore sold by the United States."—(4 Stat. at Large, pp. 358, 359, ch. 40.)

The fourth section of the same act is as follows: "The confirmation

of all the claims provided for by this act shall amount only to a relinquishment forever on the part of the United States of any claim whatever to the tracts of land and town lots so confirmed; and that nothing herein contained shall be construed to affect the claim or claims of any individual or body politic or corporate."—(Ibid., p. 359.)

The petitioner has filed with his papers a copy of the proceedings which were had before the commissioner of land claims east of Pearl river at the instance of James Conway. He has also filed a copy of the proceedings which were had at his instance before the register and receiver of the land office of the district of St. Stephens. The report of the register and receiver, forming a part of the latter proceedings, is as follows: "The heirs of William Turvin, sr., presented their claim, in due form, to nine hundred and sixty arpents of land situate and lying in township one and two south, range two east, on the east bank of Mobile river and east branch of the same, usually called the Tensaw, and bounded by the Bayou Pascual and the land claimed by Straham, founded—

"1st. On a concession from the Spanish government, dated August 3, 1787, issued by Vte. Folch, with an order of survey signed by Stephen Miro, same date, authorizing the petitioner, Samuel Moore, to be put in possession of twelve arpents front, with the ordinary depth of forty; and which claim appears to have been conveyed, by deed of conveyance, to William Turvin, on the 7th day of November, 1791.

"2d. To twelve other arpents front, with the ordinary depth, adjoining the foregoing, granted to the said William Turvin by the Spanish government; on which claims of the said William Turvin, the commissioner, William Crawford, made an unfavorable report, the claimant, William Turvin, having neglected to furnish any proof of cultivation and inhabitation.

"The present claimants revive the claim of said William Turvin, sr., deceased, under the 3d section of the act of Congress entitled 'An act confirming the reports of the register and receiver of the land office for the district of St. Stephens, in the State of Alabama, and for other purposes,' approved on the 2d of March, 1829.

"The said claim is found recognized, by the claimant under Richard Turvin, as one of the boundaries of the last, and which claim of Richard Turvin has been confirmed.

"From the testimony furnished by the claimants under Richard Turvin, sr., deceased, it appears that his claim had been submitted to the action of Congress, and referred to the Committee on Public Lands, in 1823; and, in the same year, referred to the Committee on Private Land Claims, and also to the register of St. Helena and Jackson Court-house land district.

"Cultivation appears to be proved, by the testimony, of twenty-six years previous to 1820, by Diego McVoy.

"Cultivation and inhabitation is proved by the testimony of William McVoy and Margaret McVoy.

"Cultivation and inhabitation is proved by the testimony of Diego McVoy, from 1791 to 1810—the period of the death of William Turvin, senior—with possession by the heirs to 1813.

"Cultivation and possession, from 1808 to William Turvin's death, are proved by the testimony of Solomon Stewart, and continued possession by the heirs until the 12th November, 1835.

"The foregoing claim appearing to the undersigned to be supported agreeably to the 3d section of the act before recited, under which the heirs of William Turvin, sr., deceased, now claim, respectfully beg leave to express their opinion that the said claim ought to be confirmed."

The Acting Commissioner of the General Land Office, in a letter dated October 13, A. D. 1857, addressed to the Hon. Philip Phillips, the counsel for the petitioner, says: "As requested in your note of this date, I state that it appears from the records and plats in this office that all the southern part of township one south, of range two east, lying east of Tensaw river, for a distance of more than three miles from the southern boundary of said township, and the north part of township two south, of range two east, and lying east of Tensaw river, for a distance of more than two miles from the northern boundary of said township, except the east part of section eleven and all of section twelve, which are in the eastern part of said township and distant from Tensaw river, but are one mile from the northern boundary of said township, and are covered by the private claims of Joshua Kennedy, J. L. Seabury, the heirs of Robert Wolfington, the representatives of William Fisher, John and Bruner Griffin, the heirs of Robert Gilchrist, and Aaron Barlow and wife; from which it will be seen that these private claims cover all the land described in the report of the register and receiver as 960 arpents, situate and lying in township one and two south, of range two east, on the east bank of the Mobile river and east branch of the same—usually called the Tensaw river—and bounded by the Bayou Pascual and the land claimed by Straham."

It seems to us that the claim presented in the petition is supported by the evidence authorized and required by the act of March 2, A. D. 1829. It seems to us, also, to be the design of that act that Congress shall determine what action shall be taken upon favorable reports made under it. We shall, therefore, report to Congress the bill which was reported to the Senate by the committee on private land claims in favor of the heirs of William Turvin, deceased, on the 10th day of July, A. D. 1854, for such action to be had thereon as may be deemed proper.

A BILL for the relief of the heirs of William Turvin, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the heirs of William Turvin, deceased, be, and they are hereby, authorized to locate, free of cost, nine hundred and sixty arpents of land, or as near thereto as the same can be done, not exceeding that quantity, according to the legal subdivisions, on any of the public lands of the United States,

subject to entry at private sale; which lands, when so located, shall be in full for the claim of their said father, William Turvin, to a tract of land lying on the east side of the Mobile river and west of the Bayou Pascual, under a grant from the Spanish government, and which was recommended for confirmation in the report of the register and receiver of the land office for the district of St. Stephens.

SEC. 2. *And be it further enacted*, That the Commissioner of the General Land Office, upon receipt of the certificate of entry from the proper land office, be, and he is hereby, authorized to issue a patent for the land so located.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 22.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ANN B. JOHNSON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ANN B. JOHNSON *vs.* THE UNITED STATES.

To the honorable Court of Claims of the United States:

Your petitioner, Ann B. Johnson, of the county of Henrico, and State of Virginia, respectfully represents, that she is the widow of Peter Johnson, deceased, who was a lieutenant of cavalry in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Peter Johnson subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of four hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it

should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief. ——— ———,
Justice of the Peace.

IN THE COURT OF CLAIMS.

ANN B. JOHNSON *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857 in which he states that there is evidence on file in the Pension Office that Peter Johnson, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of four hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Ann B. Johnson, of the county of Henrico, State of Virginia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Ann B. Johnson, the widow of Peter Johnson, deceased, a lieutenant in the army of the revolution, the sum of $1,966 67, being for the arrears of her pension at the rate of four hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 23.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

POLLY BOOTH *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON.
Chief Clerk Court of Claims.

POLLY BOOTH *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Polly Booth, of the county of Madison, and State of New York, respectfully represents: That she is the widow of Isaiah Booth, deceased, who was a soldier in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Isaiah Booth subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of ninety dollars per annum, on account of the revolutionary services of her

said husband, under the second section of the act of Congress approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

POLLY BOOTH *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Isaiah Booth, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of ninety dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Polly Booth, of the county of Madison, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed to pay to Polly Booth, the

widow of Isaiah Booth, deceased, a soldier in the army of the revolution, the sum of $442 50, being for the arrears of her pension, at the rate of ninety dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 24.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committe of Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY GRANT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.
[L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARY GRANT *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mary Grant, of the county of ———, and State of South Carolina, respectfully represents: That she is the widow of William Grant, deceased, who was a lieutenant in the war of the revolution, and who died on the 28th of August, 1851. She further states that she was married to the said William Grant subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of

one hundred and seventy dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 28th of August, 1851, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this —— day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

MARY GRANT *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that William Grant, her husband, died on the 28th of August, 1851, and that she has been allowed a pension at the rate of one hundred and seventy dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 28th of August, 1851, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Mary Grant, of the county of ————, State of South Carolina

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Mary Grant, the widow

of William Grant, deceased, a lieutenant in the army of the revolution, the sum of two hundred and forty-three dollars and sixty-six cents, being for the arrears of her pension, at the rate of one hundred and seventy dollars per annum, from the 28th of August, 1851, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 25.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MELINDA DURKEE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

PETITION.

MELINDA DURKEE *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioner, Melinda Durkee, of the State of Georgia, respectfully represents that she is the widow of Nathaniel Durkee, who departed this life on the —— day ———, A. D. ——, and that her said husband served during the war of the revolution sufficiently to have entitled him to an annuity or pension of two hundred and forty

dollars per annum under pension laws existing previously to and on the 4th March, 1848, and still existing.—(Vide act of Congress, approved March 18, 1818, ch. 19, Stat. at Large, vol. 3, p. 410; act of March 3, 1819, ch. 81; act of May 1, 1820, ch. 53; act of March 1, 1823, ch. 59; an act approved June 7, 1832, entitled "An act supplementary to the act for the relief of certain surviving officers and soldiers of the revolution," Stat. at Large, vol. 4, p. 529; act passed the 15th day of May, 1828, entitled "An act for the relief of certain surviving officers and soldiers of the army of the revolution," Stat. at Large, vol. 4, p. 269.)

And your petitioner shows that, by the first section of the act of Congress approved July 29, 1848, entitled "An act for the relief of certain surviving widows of officers and soldiers of the revolutionary army," (Stat. at Large, vol. 9, p. 265, ch. 120,) "the widows of all officers, non-commissioned officers, musicians, soldiers, mariners or marines, and Indian spies, who shall have served in the continental line, State troops, volunteers, militia, or in the naval service, in the revolutionary war with Great Britain, shall be entitled to a pension during such widowhood, of equal amount per annum that their husbands would be entitled to, if living, under existing pension laws, to commence on the 4th day of March, A. D. 1848," &c.; "but no widow married after the 1st day of January, one thousand eight hundred, shall be entitled to receive a pension under this act." And your petitioner shows that, under the second section of the act of Congress entitled "An act to continue half-pay to certain widows and orphans," approved February 3, 1853, (vide Stat. at Large, vol. 10, p. 154, ch. 41,) it is enacted "That the widows of all officers, non-commissioned officers, musicians, and privates of the revolutionary army, who were married subsequent to January, A. D. 1800, shall be entitled to a pension in the *same manner* as those who were married before that day."

Your petitioner shows that, under the first section of said act of July 29, 1848, and the said second section of the said act of February 3, 1853, (which are *pari materia*, and properly construable as one and the same act *quoad hoc*,) she is entitled to an annuity or pension during her widowhood of two hundred and forty dollars per annum, "to commence on the 4th day of March, 1848."

And your petitioner shows that she made application to the Pension Office of the Department of the Interior for the annuity or pension to which she was entitled as aforesaid, and that on the 7th day of April, A. D. 1854, a certificate was issued by and from said office and department, under and upon which she has received an annuity or pension of two hundred and forty dollars per annum from the 3d February, 1853, and that said office and department refused, and have ever since refused, to allow or to pay your petitioner any annuity or pension for or during any portion of the time, from the 4th March, 1848, to the 3d February, 1853, thus leaving still due and owing to your petitioner the sum of two hundred and forty dollars per annum from the 4th March, 1848, to the 3d February, 1853, a period of four years and eleven months, to wit: eleven hundred and eighty dollars, for which sum she prays the judgment of this honorable Court. No

action has been had upon said claim in Congress, nor any of the departments except that above stated, and your petitioner is the sole owner and only person interested in said claim.

Your petitioner further represents that the original papers and evidence upon which the above named annuity or pension was granted and claimed, and upon which she confidently relies for the favorable judgment of this honorable Court, are on file in the Pension Office in the Department of the Interior, and that the same are not allowed by said office or department to be withdrawn therefrom by your petitioner nor any person by her thereunto authorized, she therefore prays this honorable Court to make a special order calling upon the said Pension Office or Department of the Interior for said papers and evidence, to be delivered to the clerk of this Court, to be used upon the hearing and determination of this case.

MELINDA DURKEE,
By LEVI S. RUSSELL, *Attorney*.

COUNTY OF WASHINGTON, *ss*.

On this fifth day of December, A. D. 1856, Levi S. Russell, known to me to be the person who signed the foregoing petition as attorney, before me, the undersigned, a justice of the peace in and for the county aforesaid, and made oath upon the Holy Evangely of Almighty God, that the facts set forth in said petition are true, to the best of his knowledge and belief.

J. H. GODDARD, *J. P.* [SEAL.]

IN THE COURT OF CLAIMS.

MELINDA DURKEE *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Nathaniel Durkee, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of two hundred and forty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Melinda Durkee, of the State of Georgia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the Treasury not otherwise appropriated, to pay to Melinda Durkee, the widow of Nathaniel Durkee, deceased, a quartermaster in the army of the revolution, the sum of $1,180, being for the arrears of her pension, at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3 of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 26.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as a report in the case of

SARAH EATON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

SARAH EATON *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Sarah Eaton, of the county of Worcester, and State of Massachusetts, respectfully represents: That she is the widow of William Eaton, deceased, who was a sergeant in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said William Eaton subsequent to the 1st day of January, 1800, and has been allowed a pension at the

rate of one hundred and twenty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and district, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

_____,
Justice of the Peace.

IN THE COURT OF CLAIMS.

SARAH EATON *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office, that William Eaton, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of one hundred and twenty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Sarah Eaton, of the county of Worcester, State of Massachusetts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Sarah Eaton, the widow of William Eaton, deceased, a sergeant in the army of the revolution, the sum of $590, being for the arrears of her pension at the rate of one hundred and twenty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 27.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

BENJAMIN L. McATEE AND J. N. EASTHAM

vs.

THE UNITED STATES.

1. The petition of the claimants.
2. Copies of contracts referred to in the opinion of the Court and transmitted to the House of Representatives.
3. A map of the routes referred to by the Court, and other documents referred to the Court of Claims by the House of Representatives and returned to that House.
4. Depositions introduced by the claimants transmitted to the House of Representatives.
5. United States Solicitor's brief.
6. Opinion of the Court.
7. Bill for the relief of the claimants.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of McAtee and Eastham, of Louisville, Kentucky, respectfully represents: That at the regular letting of the mail contracts by the Post Office Department, in the spring of 1846, your petitioners were the lowest bidders, and became the contractors for

carrying the mail from the first of July, eighteen hundred and forty-six, to the 30th of June, eighteen hundred and fifty, on route No. 3960, from Louisville to Vincennes, for the annual compensation of seven thousand seven hundred and fifty-four dollars and forty-five cents; and upon the failure of the previous contractors on route No. 4169, from Vincennes to St. Louis, your petitioners became the contractors on that route also, from the 15th of April, eighteen hundred and forty-seven, to said 30th of June, eighteen hundred and fifty, at the annual compensation of twelve thousand six hundred and forty-five dollars. Both these contracts required daily service the whole way, and in four-horse post coaches.

Your petitioners further represent, that both said contracts have so far been fully performed in good faith in all their stipulations on their part; but that on the part of the Post Office Department a service has been imposed on your petitioners which was not only not contemplated by either party to the said contracts, but was wholly against the arrangement of the mail service, and has most oppressively and injuriously operated upon your petitioners. The mail carried over their said routes, and in reference to which their bids and contracts were made, were the ordinary mails from Louisville and the circumjacent country; whilst the great eastern mail, passing through Wheeling, Columbus, and Dayton, was to be conveyed from the last named place by a route especially raised and constructed for that very purpose, viz: No. 2353, by Terre Haute, Indiana, to St. Louis, in Missouri, on which route a contractor was paid for performing that very service.

Notwithstanding your petitioners had scarcely entered upon the performance of their duties under their said contracts, when large portions of the heavy matter which belonged to and should have been carried on route No. 2353 was thrown upon them by changing and diverting said mails from Columbus and Dayton to Cincinnati, and thence down the Ohio river to Louisville, where it was imposed upon them. A similar change was made at Terre Haute, and the heavy mails sent down the Wabash to Vincennes, and there added to the accumulations from Louisville. This most unjust imposition was practiced until the first of January, eighteen hundred and fifty, when the Post Office Department, having in the preceding fall at last sent a special agent to inquire into the exact state of the case, finally interposed, and gave an order which from that time relieved your petitioners from the unjust oppression.

The extra mail matter so thrown upon your petitioners far exceeded, and perhaps doubled on the average, the mails they were bound to carry. They were thus compelled to transport loads appropriate to *six* instead of *four* horses. By overloading and filling the coaches with mail bags instead of passengers, one of the principal sources of profit was stopped, and in addition the coaches and harness were broken and worn down, and a large number of horses killed and rendered useless; thus by a double injury increasing their expenditures and diminishing their income.

Your petitioners further represent, that well knowing it was not the design of the department that any portion of the great eastern mail should be thrown upon them, and that it violated the arrange-

ments of the mail service, they supposed the evil might be corrected by friendly expostulation with the contractors on route No. 2353, and with the postmasters at the several offices from which the diversion of the mails took place. In this reasonable expectation they were wholly disappointed. It not unfrequently happened that whilst your petitioners' coaches, overladen with mail matter which did *not* belong to them, were struggling along bad roads, and scarcely able, even without a single passenger, to accomplish the trip, the contractors to whom it *did* belong, and who were paid for carrying it in four-horse coaches over another road, were in fact carrying the small amount of mail retained by them *on horseback*. When they addressed themselves to the department, they felt they had just cause of complaint at the imposition of unjust burdens on them, whilst others were exempt thereby from the performance of contract service; by which imposition they sustained, as already stated, not only great personal trouble, but heavy pecuniary loss.

The applications to the department were frequently made, to be either relieved from the burdens or paid for the service, in vain; and nothing but pride of character and zeal for the service, as well as a confidence that justice would be finally rendered to them by the proper authorities, prevented them from throwing down and refusing to carry the mails thus unjustly thrown upon them.

Your petitioners repeat that the additional mails above named far exceeded in weight and bulk the mails they were bound to carry; and that a sum less than the stipulated price of their contracts could not be an adequate compensation therefor. It is true, at one time, in the hope of coming to an understanding with the department on this subject, they offered to continue the extra service for the sum of $8,000 per annum, and on a subsequent occasion agreed to receive even $6,000, so important was it to them to have the money in hand to defray the additional expenses they were compelled by the extra service to incur, and thereby avoid the sacrifices contingent on delayed payments, and the trouble and expense of an appeal to Congress. These liberal and moderate offers were declined, first from having determined to correct the evil by turning the mails into their proper channels, and thus relieving your petitioners from the imposition; and secondly, because however just their claim was the act of Congress of 2d July, eighteen hundred and thirty-six, *limited the power of the department* to compensation taking effect after the date of its order. The offers being thus declined, from whatever cause the losses and sacrifices inseparable from delay in payment having been incurred, and your petitioners having been driven to appeal to your honorable bodies, they feel themselves released from said propositions, and therefore appeal, as they now do, with confidence of receiving justice at your hands, to you for a fair compensation for the services they have rendered the public thus far without pay. This compensation can be easily graded by the standard already established by the contracts between the department and your petitioners; and as it clearly appears, by the proofs accompanying this petition, that they were compelled to perform *more than double* service, that a double compensation, or an addition of an equal amount to their contract price, be paid them.

Your petitioners are the sole owners of said claim, and have heretofore presented the same to Congress; and the action in that body has been as follows: on December 20, 1850, it was referred to the Committee on the Post Office and Post Roads; January 12, 1852, referred to same committee; and in July, 1852, they made report No. 307. On December 14, 1853, again referred to same committee; and on April 5, 1854, they made a favorable report, (324,) and proposed a bill for your petitioners' relief. By resolution of March 3, 1855, it was referred to this honorable court.

A. H. LAWRENCE,
JOHN M. McCALLA,
JOHN S. EDWARDS,
Attorneys for claimants.

DISTRICT OF COLUMBIA, }
Washington County. }

On this 10th day of July, A. D. 1855, before me, a justice of the peace in and for said county, personally appeared John S. Edwards, agent and attorney in fact for the within petitioner, and made oath that the facts stated in the within petition are true, to the best of his knowledge and belief.

JOHN L. SMITH, *J. P.*

IN THE COURT OF CLAIMS.—No. 53.

McATEE & EASTHAM *vs.* THE UNITED STATES.

Solicitor's brief.

1st. The petition does not state a case of which this court has jurisdiction. It does not set out a copy of the contracts; but the contracts now given in evidence show that the petitioners contracted to carry the mail of the United States from Louisville to St. Louis in four-horse post coaches. This contract does not specify any particular weight of mail, or from what offices the mail to be carried is to come or is to go, but requires the contractors to carry all mails sent on that route, even to the exclusion of passengers, within the limits of four-horse post coach service, and that limit has not been exceeded.

2d. If the petitioners rest their demand on the allegation that they have performed extra service, then the right to recover on that allegation is resolved on two grounds:

1. There was no extra service performed; the contract does not stipulate for any weight of mail below four-horse post coach service, or for the carriage of any mail usually coming from, or going to, particular offices, or carried over particular routes; then the suggestion in the evidence that extra mail matter carried on this route is unfounded.

2. The twenty-third section of the act of July 2, 1836, (5 Stat. at Large, p. 85,) forbids the allowance of additional compensation except in exact proportion to the original service and compensation, and

forbids any extra allowance for increased speed unless additional stock and carriers are rendered necessary. The forty-third section of the act of March 3, 1825, (4 Stat. at Large, p. 114,) forbids any allowance over the amount stipulated in the contract, unless additicnal service be required. Under these provisions of the law and the contracts in this case, the Postmaster General is forbidden to make an allowance for additional service unless more than four-horse coach service be performed; and the parties can raise no implied contract to pay more, without showing they performed more service, or subverting the legislation of Congress.

3d. The petitioners have not in their evidence even made out a case for an appeal to the liberality of the government; first, because they do not allege or prove that they sustained a loss in the performance of this contract; and the effort to make out a case for damages leads strongly to the conclusion that the petitioners had a most beneficial contract.

4th. It was the duty of the petitioners to adduce evidence which would show clearly and distinctly what losses they had sustained. This they have not done. The loose and vague testimony of loss offered by them will not bear examination. Three witnesses express an opinion that the petitioners lost $50,000 by what is called extra mail; and these losses are said to have occurred in three items—horses, coaches and harness, and exclusion of passengers. 1st. Horses. Two witnesses state that one hundred horses died in the four years of this service. They died in spring and summer. How many died from carelessness and improper management does not appear. How many annually die in ordinary mail service, if any, does not appear. The value of these horses is not shown; such horses as are used in mail service are probably worth from $60 to $75. But assume them to be worth $100, and we have in horses, in four years, one hundred, at $100 each, making $10,000. 2d. Coaches. How many coaches were broken and destroyed is not shown, and for this item we are left to conjecture. Assume there were nine coaches on this route, there is no allegation or attempt to show all these coaches were destroyed, or what their value was. But take each coach and harness to be worth $800, then this alone would in four years give $7,200. 3d. The items of horses, $10,000, and coaches, $7,200, making $17,200; this leaves $32,800 estimated loss for excluding passengers in the four years.

The vagueness of this estimate is manifest from the fact that the heavy mails were carried only about three months in the year, when the Columbus route was impassable, and even then all the passengers were not excluded, and it is not pretended that even one-fourth of those applying were excluded. But assume for these three months one-half were excluded, and then we must assume a receipt of passengers for the same winter months of the four years at $32,800, or for each year for the three winter months of $8,200. Now, the travel may be assumed, in each of the remaining nine months, to be equal to the winter months. But in three winter months $8,200 is received, and $8,200 not received, making for each year an estimate of $16,400; multiply this for the other three-quarters by three, and we have the estimate of $49,200 for the nine months' receipt for passengers; to which add the $8,200 supposed to be received, and it makes $57,400

per annum, or $229,600 for receipts from passengers. If this calculation be considered loose and absurd, it is so because the materials furnished by the plaintiffs will not permit a better one to be made. They certainly have received from the government $81,597 80; and there is no allegation, evidence, or reason, to suppose their contract was not a profitable one.

But the petitioners have no right to recover for the exclusion of passengers from their coaches, because the United States contracted for the use of four-horse post coaches, to the full extent of their capacity, to transport the mail.—(See act of Congress, March 3, 1845, sec. 18; 5 Stat. at Large, p. 738. See contracts of parties to carry the mail from July 1, 1846, to June 30, 1850.)

D. RATCLIFFE,
Assistant Solicitor Court of Claims.

IN THE COURT OF CLAIMS.

McATEE AND EASTHAM *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

On the 20th day of May, A. D. 1846, the petitioners entered into a contract with the United States for carrying the mail on route No. 3960, from Louisville, Kentucky, to Vincennes, daily and back, in four-horse coaches, at seven thousand seven hundred and fifty-four dollars and forty cents per year, for and during the term commencing the first day of July, A. D. 1846, and ending with the 30th day of June, A. D. 1850.—(See a copy of the contract on file in this case.)

On the 25th day of March, A. D. 1847, the petitioners entered into a contract with the United States for carrying the mail on route No. 4169, from Vincennes, Indiana, to St. Louis, Missouri, and back, daily, in four-horse coaches, at twelve thousand six hundred and forty-five dollars per year, for and during the term commencing the 15th day of April, A. D. 1847, and ending with the 30th day of June, A. D. 1850.

The petitioners allege that the mail carried over those routes, and in reference to which their bids and contracts were made, were the ordinary mails from Louisville and the circumjacent country.

There were other routes, extending from Columbus to Dayton, Ohio, from Dayton to Indianapolis, from Indianapolis to Terre Haute, and from Terre Haute to St. Louis. The petitioners allege that the great eastern mail was to pass along these routes, and that the route No. 2353, from Dayton, by Terre Haute, to St. Louis, was constructed for that very purpose, and a contractor paid for the service.

The Postmaster General, in his letter of March 3, A. D. 1851, to a member of the Committee on the Post Office and Post Roads, of the House of Representatives, states as follows: "Previously to 1846 the great eastern mail to and from St. Louis was sent over these routes, [No. 3960 and No. 4169;] but in framing the advertisement for proposals to transport the mails in Indiana and Illinois for the term of four years, commencing July 1, 1846, the department invited bids on the

routes from Indianapolis to Terre Haute, Indiana, and from Terre Haute, by Vandalia, Illinois, to St. Louis, Missouri, for service of the same grade and speed as on the lower routes by Louisville and Vincennes to St. Louis, in order to the selection of the one or the other line for the transportation of the eastern mail for St. Louis and parts beyond. Upon a careful examination of the proposals made to transport the mail on these now rival routes, the department selected the upper one, by Indianapolis, Terre Haute, and Vandalia, because the bidders on this line offered to deliver the mail in St. Louis seventeen hours in summer, and twelve hours in winter, earlier than it was alleged it could be done by way of Louisville and Vincennes; and contracts were accordingly made for the transportation of the mail in question on the upper route, from the first July, 1846. Under the former arrangement, the great mail for St. Louis, and places beyond, was carried by Cincinnati, Louisville, and Vincennes; but agreeably to the mail arrangement which commenced first July, 1846, it was sent from Springfield, Ohio, by Dayton, Ohio, Indianapolis and Terre Haute, Indiana, and by Vandalia, Illinois, to St. Louis."

The petitioners allege that soon after they entered upon the performance of their duties, under the contracts above mentioned, large portions of the heavy mail matter, which belonged to the upper route was thrown on them, by diverting it from Columbus and Dayton to Cincinnati, and thence down the Ohio river to Louisville; that a similar change was made at Terre Haute, and the heavy mails sent down the Wabash to Vincennes, and there added to the accumulations from Louisville; and that this was practiced until the first of January, A. D. 1850, when the Post Office Department having, by special agent, inquired into the exact state of the case, relieved the petitioners.

The petitioners also allege that the mail matter so thrown upon them far exceeded, and perhaps doubled, on the average, the mails they were bound to carry; that they were thus compelled to transport loads appropriate to *six* instead of *four* horses; and that, by overloading and filling the coaches with mail bags instead of passengers, one of their principal sources of profit was stopped; and, in addition, the coaches and harness were broken and worn down, and a large number of horses killed and rendered useless: thus, by a double injury, increasing their expenditures and diminishing their income.

The petitioners also allege that they supposed that the evil might be corrected by friendly expostulation with the contractors on the upper route, and the postmasters at the several offices from which the diversion of the mails took place; but that, in this reasonable expectation, they were wholly disappointed.

The petitioners further allege that applications to the department were frequently made, to be either relieved from the burdens or paid for the service, in vain.

The petitioners also allege that at one time they offered to continue the extra service for $8,000 *per annum*, and afterwards to receive even $6,000 *per annum;* but these offers were rejected. They now claim to be paid for the *extra* service a compensation equal to the contract

price for the regular service, which they were bound to perform, to wit: at the rate of $20,399 40 *per annum*.

The great eastern mail, mentioned by the Postmaster General, meant the whole mail to be conveyed between the Atlantic and western States.—(See the letter of the Second Assistant Postmaster General to the assistant solicitor of this court, of January 5, A. D. 1857.) There can be no doubt that the petitioners were not bound, under their contracts above mentioned, to carry any part of this mail.

J. P. Tutwiler, the assistant postmaster at Louisville, Kentucky, testifies that during the period commencing on the 1st day of July, A. D. 1846, and ending with the 30th day of June, A. D. 1850, a large portion of the matter intended for the upper route was thrown upon the Louisville and St. Louis route *via* Vincennes. He thinks that there were from four to five canvas bags *extra* thrown on the route daily. The *extra* weight, he says, would be quite equal to what the petitioners were bound to carry by their contract, if not greater. This *extra* work commenced, he thinks, in 1847; it was first noticed in the post office at Louisville in 1847, but he cannot state the exact time of the year. His attention was first called to it by the clerks in the office. He thinks that the price for carrying the mail should be greater from 1846 to 1850, than from 1850 to 1854.

Thomas J. Read, the postmaster at Louisville from the 1st of August, A. D. 1845, till the 30th day of September, A. D. 1849, testifies in substance as follows: The mail matter for the upper route was thrown upon the route from Louisville to St. Louis, especially the canvas bags, to an unreasonable amount. There were five or six canvas bags thus thrown daily on an average, frequently more, on the lower route; and he should say an additional weight of from seven hundred to one thousand pounds. One of the petitioners complained to him frequently; and he wrote to the department on the subject, and for instructions to send the *extra* matter by the river to St. Louis, which was granted, at the expense of the petitioners. He believes that the *extra* matter was twice as much as the regular matter. He has frequently seen passengers crowded out of the stage by the *extra* matter. He thinks that it was worth more to carry the mail from 1846 to 1850, than from 1850 to 1854, because the country had been settled up, and there were more passengers, which would swell the profits; but he could not well estimate the difference.

Henry F. Watson, who was chief clerk in the post office at St. Louis from the 1st of July, A. D. 1846, to the 1st of January, A. D. 1850, testifies: He knows that the petitioners did perform *extra* mail service, but cannot state when it commenced. When it was performed, the *extra* mail matter would average from four to five hundred pounds, or from five to six canvas sacks, *per* day. The weight of the *extra* mail matter was greater in the winter and spring months, than in the summer and fall months. He recollects that during the greater part of the period between the dates above mentioned, this *extra* service was continuously performed by the petitioners. The lock-bags from Baltimore, Philadelphia, and all eastern cities came occasionally *via* Louisville, but not as frequently as the canvas bags. From 1st July, A. D. 1846, till 1st January, A. D. 1850, the post-

master at St. Louis sent the mails east, *via* Terre Haute, Indiana, whenever it was possible, though it frequently happened that they were sent *via* Vincennes. They were sent *via* Vincennes about three months in the year, and generally during the months of January, February, and March, and sometimes it might have been later than that, if the roads were very bad during the spring months. His recollection does not enable him to say that this *extra* service was performed during the whole period from 1st July, A. D. 1846, to 1st January, A. D. 1850, but he believes it was performed during the greater portion of that time in the winter months. The mail matter conveyed on these routes was not larger between 1st July, A. D. 1846, and 1st January, A. D. 1850, than it was afterwards.

Andrew Moore, agent for the petitioners from the 15th of April, A. D. 1847 to 1850, on the St. Louis and Vincennes mail route, testifies: There was a great deal of mail matter carried on that road that did not belong to it. It averaged in the winter from ten to fifteen hundred pounds, and in the summer from four to five hundred pounds, *per* day. Between the dates above named there were one hundred horses lost on that route, by reason of being overloaded with heavy mails that did not belong on the road. He knows that passengers were, between those dates, excluded from the coaches on that route by reason of the *extra* mails. This most frequently occurred in winter and spring. He estimates the damages occasioned to the petitioners by the *extra* mail matter, from the loss of horses, coaches, harness, and passengers, at $50,000. He had charge of the road from St. Louis to Vincennes. This *extra* mail matter was placed on the route *via* Vincennes from Louisville to St. Louis from the 1st July, A. D. 1847, to his knowledge. He knows that this matter was *extra*, by the bags, canvas sacks, and other bags, being marked Philadelphia, New York, and Baltimore. The leather bags were locked, and were through bags from Philadelphia, New York, &c. The weight of the whole mail matter conveyed on this route was, in winter, from 1,500 to 2,500 pounds; and in summer, from 300 to 500 pounds. In spring there were sometimes ten, sometimes twenty, and sometimes twenty-five *extra* sacks. Sacks weighed from 25 to 125 pounds. The *extra* matter was conveyed daily on that route during the whole period of which he spoke, and its weight in winter and spring was from 1,000 to 1,500 pounds; and in summer, from 300 to 400 pounds. The witness testified to other matter which we do not deem it material here to notice.

John M. Wimer, the postmaster at St. Louis from the 1st day of July, A. D. 1845, till the 3d day of October, A. D. 1849, testifies: From the 15th of April, A. D. 1847, till the 1st of October, A. D. 1849, the eastern mail during the winter and spring months came to St. Louis, *via* Louisville and Vincennes, on the petitioner's route. *Extra* mails may have come by that route in the summer and fall months, but he does not recollect that they did. During his administration, through lock-mail bags were not used. [On this point there seems to be a conflict between this witness and Andrew Moore.] He does not recollect how often the eastern mails were sent from his office by the lower route. They were only sent by that route when

the other failed. He thinks that he frequently made complaint to the department at Washington on account of his mails coming *via* Vincennes, in consequence of the delay when they were sent by that route. The witness testifies to other matter which we do not consider material to state here.—(See his deposition.)

L. O. Willhite, an agent of the petitioners on the mail route from Louisville to Vincennes, and from Vincennes to St. Louis, from the 1st of July, A. D. 1846, to the 30th June, A. D. 1850, testifies: The petitioners were compelled to carry about fifteen hundred pounds of *extra* mails a day through the winter and spring months, and during the summer and fall months perhaps not over eight hundred or one thousand pounds *per* day. The weight of the ordinary mail was from 500 to 600 pounds. He estimates the damages sustained by the petitioners, by reason of the extra mail, at $50,000. He has frequently seen between two and three thousand pounds of *extra* mail when the road was bad. It is called 110 miles from Louisville to Vincennes, and 160 miles from Vincennes to St. Louis. The first he noticed of the extra mail being put upon the route was about the latter part of November, A. D. 1846. At first there were four or five canvas sacks. As the road deepened they increased to eighteen or twenty; and, in addition, there were sometimes several heavy leather pouches. It so continued till about the middle of May, when they lightened off to from five to seven canvas sacks. There was no time that they were entirely relieved from the *extra* mail from November, A. D. 1846, till January, A. D. 1850.

Ellihu Stout, the postmaster at Vincennes from the 1st day of July, A. D. 1846, till some time in April, A. D. 1850, testifies: The petitioners carried a great deal of *extra* mail matter brought down from the upper route during the winter and spring months. He presumes the *extra* mail during the summer months was from 300 to 500 pounds, and during the winter and spring months from one to two thousand pounds, and sometimes a great deal more. He has frequently seen passengers excluded in consequence of the magnitude of the mail. He first noticed that the petitioners were carrying mail which did not properly belong to their route, early in the fall of 1846, as well as he recollects, say some time in October A. D. 1846. [The contract on route No. 4169 bears date on the 25th day of March, A. D. 1847.] He has no recollection that the *extra* mail matter was ever entirely taken by the northern route; it might have happened, but he cannot assert it. The probable average weight of the mails that by contract the petitioners were bound to carry daily, was about 400 pounds.

James W. Robinson, an agent of the petitioners from the 1st day of July, A. D. 1846, till the 30th June, A. D. 1850, on their mail routes from Louisville to Vincennes, and from Vincennes to St. Louis, testifies: During that time they carried from 1,000 to 2,000 pounds *extra* mail per day in the winter and spring months, and in the summer not so much; some days a great deal more. He estimates the damages sustained by them, by reason of this *extra* mail, at $50,000. Frequently passengers could not be carried at all in consequence of the stage being full of mail. It is called 110 miles from Louisville to Vincennes, and 158 miles from Vincennes to St. Louis.

The *extra* mail belonging to the upper route was put on the lower route 1st July, 1846. It was then from three to five canvas bags; continued so for two or three months, then increased during fall, winter, and spring, to from ten to twenty, and sometimes thirty canvas bags daily. It began again to diminish some time in May, and lightened down during the summer again to from three to five canvas sacks. The petitioners were not at any time, from 1st July, A. D. 1846, to January, A. D. 1850, entirely relieved of the *extra* mail. [Yet one of their contracts is dated the 25th day of March, A. D. 1847.]

James T. Cox, who kept the stage office for the petitioners in Louisville, in 1846, 1847, 1848, 1849, and 1850, testifies: The *extra* amount of mail carried by the petitioners, from 1st July, A. D. 1846, to 30th June, A. D. 1850, would average from 800 to 1,000 pounds; the number of canvas sacks, say from five to twelve daily, at times much more, rendering it impossible to carry passengers most of the time. (Especially in the fall and winter, at which time the travel was always good.) He is of the opinion that the petitioners sustained a loss of at least fifty or sixty thousand dollars in the transportation of the great amount of *extra* mail. The petitioners' coaches were nine passenger coaches, and the average fare from Louisville to Vincennes was about seven dollars, and from Vincennes to St. Louis about nine dollars.

The Postmaster General, in his letter of March 3, A. D. 1851, already noticed, states that the arrangement by which the great eastern mail was to go by the upper route "continued in operation, without serious complaint from any quarter, until early in the year 1848, when McAtee and Eastham, the contractors on the lower route, complained, by letter dated the 28th February, marked A, that mail matter was sent by their route which properly belonged to the upper route, and which had been sent from Columbus, Ohio, or some other point on the upper line. On the 11th March the postmaster of Columbus, Ohio, was requested to explain the cause of the irregularity, but his explanation, if he ever made any, is not on file; nor do any further complaints or reports appear to have been made to the department by McAtee and Eastham till the 25th December, 1848, when, by letter, marked B, they complained that the entire paper mail of the upper line was thrown upon their road, and that they were thus made to do work which they had never contracted to perform; and as they seemed to be aware that the bad condition of the upper road did not admit of the transportation of a heavy mail upon it, they closed their letter by offering to carry the entire paper mail to St. Louis for $6,000 per annum in addition to their original pay. The foregoing complaint was corroborated by the postmaster at Louisville, Kentucky, in a letter dated 1st January, 1849, marked C.

"This last complaint was notified to the contractor on the upper route on the 10th January, 1849, (see copy, marked D,) and he was directed to carry all the mails according to his undertaking. No reply to this letter having been received, the Postmaster General appointed and sent Mr. C. T. Pope as a special agent to ascertain and report upon the condition of the two roads and other matters connected with

the service upon them. A copy of his instructions will be found herewith, marked E.

"Mr. Pope's report (F) from Louisville, dated 28th August, 1849, as well as his final report (G,) made at Washington, 15th September, 1849, represented the Louisville and Vincennes route as the best and most practicable for the conveyance of the great mail to St. Louis; and he stated that the canvas bags, or printed matter, for St. Louis were sent from Springfield, Ohio, by Cincinnati, to Louisville, and thence on McAtee & Eastham's lines to St. Louis."

It seems to us that the petitioners have shown the following case:

They were the contractors for carrying the mail on the routes No. 3960 and No. 4169, from the 1st day of July, A. D. 1846, and 25th day of March, A. D. 1847, till the 30th day of June, A. D. 1850.

They were not bound to carry the great eastern mail. But in the fall of 1846, or early in 1847, a portion of that mail was thrown upon them, and they continued to carry it, to a greater or less extent, till about the first day of January, A. D. 1850. The burden upon them was much greater during the winter and spring than during the summer and fall.

They, however, made no complaint to the Postmaster General till the 28th day of February, A. D. 1848.—(See their letter of that date.)

On the 11th day of March, A. D. 1848, the Postmaster General wrote to the postmaster at Columbus upon the subject, but received no answer.

No further complaint was made by the petitioners to the Post Office Department till the 25th day of December, A. D. 1848, when they again wrote to the Postmaster General.—(See their letter of that date.)

On the 10th day of January, A. D. 1849, the Postmaster General wrote to the contractor on the upper route, but received no answer.

About the 2d day of August, A. D. 1849, the Postmaster General appointed a special agent "to ascertain the deficiencies," &c.—(See the letter of instructions to the agent, marked E.)

If the petitioners meant to hold the United States responsible for the *extra* work thrown upon them, they ought to have given immediate notice to the Postmaster General of the failures of the upper route, and of the wrong which they were suffering. This would have enabled him to take measures to remedy the evil. But this was not done till the 28th day of February, A. D. 1848; and even then all that was asked was, that the Postmaster General should give the postmaster "at Columbus some direction relative to the matter." This direction was given, and no further complaint was heard at the department till the 25th day of December, A. D. 1848. The Postmaster General might, therefore, very reasonably have concluded that the whole matter had been satisfactorily arranged. If it was not, the fault was certainly not his. He did all that he was requested to do.

When the letter of the 25th day of December, A. D. 1848, was received, its character was such, we think, that it immediately became the duty of the Postmaster General to take prompt and decisive measures for the relief of the petitioners. Such, doubtless, was his own view of his duty. We think that, from all the circumstances of this transaction, it may very properly be inferred that from that time he designedly permitted matters to go on till he could take measures for

their investigation, and that a temporary contract with the petitioners to continue the service may reasonably and justly be implied. The postmaster general had the power, under the 23d section of the act of 1836, (5 Stat. at L., p. 85, ch. 270,) to make a temporary contract; and this, it seems to us, was a proper case for the exercise of that power. He did not succeed in arranging the difficulties till the 1st day of January, A. D. 1850. The implied contract, then, may be regarded as having continued for one year, and the petitioners are entitled to a reasonable compensation for the services rendered by them under it.

The predecessors of the petitioners carried the great eastern mail, and their compensation was $24,115 a year. Their time from Louisville to St. Louis was 78 hours, and from St. Louis to Louisville the same. The regular compensation of the petitioners was $20,399 40 a year. Their time from Louisville to St. Louis was 49½ hours, and from St. Louis to Louisville 42 hours. J. N. Eastham, one of the firm of McAtee & Eastham, and the successor of the latter, carried the great eastern mail in 12 hours less time than that required by the contracts with the petitioners for $22,138 a year. Shortly before the 30th day of July, A. D. 1852, the eastern mail was restored to the upper route, and an additional sum of $14,000 a year allowed therefor by the department.—(See report No. 163, 32d Congress, 1st session, H. of Reps.; and report No. 130, 33d Congress, 1st session, H. of Reps.) The petitioners themselves, on the 25th day of December, A. D. 1848, offered to carry the entire paper mail to St. Louis for $6,000 a year, in addition to their original pay. On the 5th day of September, A. D. 1849, they "demanded $8,000 additional compensation for carrying the St. Louis mail over their routes, and delivering it at an increased speed of 12 hours."—(See the letter of the Postmaster General already referred to.)

Two favorable reports have been made on this case in the House of Representatives: the first on the 30th day of July, A. D. 1852, and the second on the 5th day of April, A. D. 1854. In each of them the committee came to the conclusion to recommend the allowance of $6,000 a year to the petitioners. It is obviously a difficult task to determine what would be just in the premises, but, under all the circumstances of this case, we think that the estimate of the committees was reasonable. They recommended an allowance of $6,000 a year for three and a half years. For reasons already stated, we do not feel justified in allowing compensation for more than one year.

We shall report to Congress a bill in favor of the petitioners for the sum of $6,000.

A BILL for the relief of Benjamin L. McAtee and J. N. Eastham, of Louisville, Kentucky.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Benjamin L. McAtee and J. N. Eastham the sum of six thousand dollars in full, for transporting extra mail matter over routes No. 3960 and No. 4169, between the first day of July, 1846 and the thirtieth day of June 1850.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 28.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY ANN HOOPER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of the claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARY ANN HOOPER *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mary Ann Hooper, of the county of ———, and State of Virginia, respectfully represents: That she is the widow of James Hooper, deceased, who was a soldier in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said James Hooper subsequent to the 1st day of

January, 1800, and has been allowed a pension at the rate of ninety-six dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 2, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pensions, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, } *ss.*
Washington County. }

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and district, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

———— ————,
Justice of the Peace.

IN THE COURT OF CLAIMS.

MARY ANN HOOPER *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office, that James Hooper, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of eighty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 31.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ANNA HILL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ANNA HILL *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Anna Hill, of the county of Monroe and State of New York, respectfully represents that she is the widow of Ichabod Hill, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Ichabod Hill subsequent to the 1st day of

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 29.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

TEMPERANCE CHILDRESS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

TEMPERANCE CHILDRESS *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Temperance Childress, of the county of ———, and State of Virginia, respectfully represents: That she is the widow of Alexander Childress, deceased, who was a soldier in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Alexander Childress subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of one hundred dollars per annum, on account of the

revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and district, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

_____,
Justice of the Peace.

IN THE COURT OF CLAIMS.

TEMPERANCE CHILDRESS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Alexander Childress, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of one hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her penson from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Temperance Childress, of the State of Virginia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Temperance Childress, the widow of Alexander Childress, deceased, a soldier in the army of the revolution, the sum of $491 66, being for the arrears of her pension at the rate of one hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 30.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

LYDIA CLAPP *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

LYDIA CLAPP *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Lydia Clapp, of the county of Washington and State of New York, respectfully represents, That she is the widow of Jonathan Clapp, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Jonathan Clapp subsequent to the 1st day of January, 1800, and has been allowed a pension at the

rate of four hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans; which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 23d day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

LYDIA CLAPP *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Stephen Clapp, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of four hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Lydia Clapp, of the county of Washington, and State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in

the treasury not otherwise appropriated, to pay to Lydia Clapp, the widow of Jonathan Clapp, deceased, an officer in the army of the revolution, the sum of $1,966 66, being for the arrears of her pension at the rate of four hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 31.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ANNA HILL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ANNA HILL *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Anna Hill, of the county of Monroe and State of New York, respectfully represents that she is the widow of Ichabod Hill, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Ichabod Hill subsequent to the 1st day of

January, 1800, and has been allowed a pension at the rate of two hundred and forty dollars per annum on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entited "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

ANNA HILL *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* the United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office, that Ichabod Hill, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of two hundred and forty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Anna Hill, of the county of Monroe, and State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not othewise appropriated, to pay to Anna Hill, the widow of Ichabod Hill, deceased, an artificer in the army of the revolution, the sum of eleven hundred and eighty dollars, being for the arrears of her pension at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 32.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

NANCY ITTIG *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 7th day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

NANCY ITTIG *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Nancy Ittig, of the county of Herkimer and State of New York, repectfully represents, that she is the widow of Conrad Ittig, deceased, who was a soldier in the war of the revolution, and who died *prior to the 4th of March,* 1848. She further states that

she was married to the said Conrad Ittig subsequent to the 1st day of January, 1800, and had been allowed a pension at the rate of $100 per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

NANCY ITTIG *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Conrad Ittig, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of $100 per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Nancy Ittig, county of Herkimer, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Trea-

sury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Nancy Ittig, the widow of Conrad Ittig, deceased, a soldier in the army of the revolution, the sum of four hundred and ninety-one dollars and sixty-seven cents, being for the arrears of her pension at the rate of one hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 33.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of

ELIZABETH KING *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificates of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this 7th day of December, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ELIZABETH KING *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Elizabeth King, of the county of ———, and State of Virginia, respectfully represents: That she is the widow of Jacob King, deceased, who was a soldier in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Jacob King subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of twenty-three dollars and thirty-three cents per annum, on account of the revolutionary services of her said husband, under the second section of

the act of Congress approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this ——— day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

ELIZABETH KING *vs.* THE UNITED STATES.

Chief Justice Gilchrist delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Jacob King, her husband, died prior to the 4th of March 1848, and that she has been allowed a pension at the rate of twenty-three dollars and thirty-three cents per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An Act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Elizabeth King, of the county of ———, State of Virginia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Elizabeth King, the widow of Jacob King, deceased, a soldier in the army of the rev-

olution, the sum of $114 71, being for the arrears of her pension at the rate of $23 33 per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 34.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SARAH LOOMIS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

SARAH LOOMIS *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Sarah Loomis, of the county of New London, and State of Connecticut, respectfully represents, that she is the widow of Isaiah Loomis, deceased, who was a conductor of teams in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Isaiah Loomis subse-

quent to the 1st day of January, 1800, and has been allowed a pension at the rate of $182 50 per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

Justice of the Peace.

IN THE COURT OF CLAIMS.

SARAH LOOMIS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Isaiah Loomis, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of one hundred and eighty-two dollars and fifty cents per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Sarah Loomis, of the county of New London, State of Connecticut.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Sarah Loomis, the widow of Isaiah Loomis, deceased, a conductor of teams, in the army of the revolution, the sum of $897 30, being for the arrears of her pension, at the rate of $182 50 per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 35.

IN THE SENATE OF THE UNITED STATES.

DECEMBER, 10, 1857.—Received from the Court of Claims.
DECEMBER, 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HANNAH MENZIES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

HANNAH MENZIES,
vs.
THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Hannah Menzies, of the county of ———, and State of Kentucky, respectfully represents, that she is the widow of Samuel P. Menzies, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Samuel P. Menzies subsequent

to the 1st day of January, 1800, and has been allowed a pension at the rate of $235 85 per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this —— day of February, 1856, personally appeared before me, the undersigned, clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

HANNAH MENZIES *vs.* THE UNITED STATES.

Chiet Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Samuel P. Menzies, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of two hundred and thirty-five dollars and thirty-three cents per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Hannah Menzies, of the State of Kentucky.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Hannah Menzies, the widow of Samuel P. Menzies, deceased, a private, lieutenant, and captain in the army of the revolution, the sum of $1,157 04 being for the arrears of her pension, at the rate of $235 33 per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 36.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

REBECCA P. NOURSE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

REBECCA P. NOURSE *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Rebecca P. Nourse, of the county of —— and State of Kentucky, respectfully represents: That she is the widow of William Nourse, deceased, who was an officer in the war of the revolution, and who died prior to the 14th of March, 1848. She further states that she was married to the said William Nourse subsequent to the 1st day

of January, 1800, and has been allowed a pension at the rate of $144 per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 3, 1853, entitled "An act to continue half pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered that on this —— day of February, 1856, personally appeared before me, the undersigned, clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

REBECCA P. NOURSE *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that William Nourse, her husband, died prior to the fourth of March, 1848, and that she has been allowed a pension at the rate of one hundred and forty-four dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Rebecca P. Nourse, of the county of ——, State of Kentucky.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the treasury not otherwise appropriated, to pay to Rebecca P. Nourse, the widow of William Nourse, deceased, an officer in the army of the revolution, the sum of $708 50, being for the arrears of her pension at the rate of one hundred and forty-four dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 37.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 10, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY PIERCE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARY PIERCE *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mary Pierce, of the county of Cortland, and State of New York, respectfully represents that she is the widow of Zebulon Pierce, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that

she was married to the said Zebulon Pierce subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of two hundred and forty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

MARY PIERCE *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Zebulon Pierce, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of two hundred and forty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Mary Pierce, of the county of Cortland, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the trea-

sury not otherwise appropriated, to pay to Mary Pierce, the widow of Zebulon Pierce, deceased, an artificer in the army of the revolution, the sum of $1,180, being for the arrears of her pension, at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1856, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 38.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

PHEBE POLLY *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

PHEBE POLLY *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Phebe Polly, of the county of Otsego, and State of New York, respectfully represents, that she is the widow of John

Polly, deceased, who was a soldier in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said John Polly subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of one hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of the said second section of the act of Congress aforesaid she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

PHEBE POLLY
vs.
THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* the United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that John Polly, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of one hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Phebe Polly, of the county of Otsego, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Phebe Polly, the widow of John Polly, deceased, a soldier in the army of the revolution, the sum of $491 67, being for the arrears of her pension at the rate of one hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 39.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM H. RUSSELL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Opinion of the Court on the preliminary question of the liability of the government.
3. Depositions offered by claimant and transmitted to the House of Representatives.
4. Documents received from the Treasury Department, transmitted to the House of Representatives.
5. Brief of the United States Solicitor.
6. Opinion of the Court.
7. Bill for the relief of claimant.

Documents received from the House of Representatives, on application of the clerk of the Court of Claims, are returned in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

[L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

WILLIAM H. RUSSELL *vs.* THE UNITED STATES.

To the Honorable the Judges of the Court of Claims:

The petition of William H. Russell, of Cass county, in the State of Missouri, respectfully represents:

That he was appointed to the office of collector of customs for the district of Monterey, in California, on the 13th day of March, A. D. 1851, while in the city of Washington; that he thereupon accepted said appointment, executed a sufficient bond for the faithful performance of the duties of his office, and, in obedience to the requirements of the Secretary of the Treasury, proceeded at once to the discharge of the duties assigned him. That the Secretary of the Treasury advanced to him in his official character as collector the sum of three thousand dollars, and caused the same to be charged to him in his said official character on the books of the treasury. That whilst he remained in the city of Washington he was constantly employed in making arrangements and receiving instructions necessary to the proper and efficient discharge of his official duties.

Your petitioner would further state, that before leaving the city of Washington, and when first appointed, he proposed to receive the oath required by law, but that the Comptroller of the Treasury construed the law as requiring that the oath of office should be taken within the district where the duties were performed. That as soon as the necessary arrangements were completed as aforesaid, he proceeded immediately to California, and on the day of his arrival there entered fully upon the discharge of the duties of his office.

That he has made no charge, nor has he received any remuneration whatever for his travelling expenses to or from California, although such expenses have been allowed in similar cases. Your petitioner therefore claims that he is entitled to receive his salary as collector as aforesaid from the date of his appointment and acceptance of the office, and the filing of the bonds required by law, on the said 13th March, 1851, until the 23d day of June following, from which time only he has received his said salary—which said claim amounts to the sum of eight hundred and forty-six dollars and fifty-seven cents.

Your petitioner would further show, that in the adjustment of his accounts as collector as aforesaid at the treasury, various charges made by him in the necessary and unavoidable discharge of the duties of his trust have been disallowed. Your petitioner claims that the same are legal and valid charges against the United States, and should be allowed to him. That said charges are principally for the purchase of a revenue boat and the wages of the men employed on board the same; that from the peculiar character of the harbor of Monterey, it was entirely indispensable that the collector should be furnished with a boat and the persons necessary to manage the same in fulfilling the duties of his office, both in the collection of the revenue and the prevention of smuggling. That the usual and almost uniform practice of the government is to furnish a revenue boat in all ports upon the

ocean, and that it was peculiarly necessary at the said port of Monterey; and as indicating the views and wishes of the department, the flag used in the revenue service and designed for revenue boats was forwarded by the Treasury Department to your petitioner.

Your petitioner further shows, that in the month of October, A. D. 1846, he was appointed by Lieutenant Colonel Frémont a major of ordnance in the California battalion, and so continued until the same was disbanded, on or about the 17th day of April, A. D. 1847. That on the 20th day of March, A. D. 1847, in obedience to the direction of Colonel Frémont, he left Los Angelos, in California, for the city of Washington, as bearer of despatches to the government of the United States from said Frémont. That at the time when he entered the service of the United States in California, and was appointed major of ordnance as aforesaid, his home and residence was at Fulton, in the State of Missouri, from which he was only temporarily absent in California; that when discharged from the public service he was by law entitled to his pay and rations, or an equivalent in money, for such term of time as would be sufficient for him to travel from his place of discharge to his home in the said town of Fulton, in said State of Missouri.

That your petitioner has claimed of the accounting officers of the Treasury Department the allowance as aforesaid provided by law, but the same has been refused by the Second Auditor, and confirmed by the Second Comptroller of the Treasury, on the ground that the word "*home*" and "*residence*," as used in the several acts and resolutions of Congress, is to be understood and construed to mean the place of appointment or entering the service.

Your petitioner would state, that at the time when said battalion was disbanded, and he thereby discharged from the service, he had left California as aforesaid in pursuance of the orders of his superior officer, for the said city of Washington, and was at said city of Washington when he first learned that the said battalion was actually disbanded, and himself consequently discharged from the service.

Your petitioner has supposed that law by he was to be considered as discharged in California, and that he was entitled to his allowance for travel from Los Angelos, in California, to his home at Fulton, in Missouri; but if he has erred in the construction of the law, and the views of the Second Auditor and Comptroller are correct, your petitioner is entitled to and claims the usual allowance for travel from the city of Washington to the place of entering the service in California; and respectfully submits to your honors to decide upon which principle the allowance as aforesaid is to be computed.

Your petitioner further shows that he is also entitled to his pay from the 24th day of March, 1847, to which date he was last paid, to the 24th day of August, A. D. 1847, when (the period of five weeks being allowed for learning of the disbanding of said battalion) he would have learned of the disbanding of said battalion.

Your petitioner presents in detail a statement of his said claims in a schedule hereto annexed, marked A.

Your petitioner would further show that he has not assigned or

transferred said claims, or either of them, or any part of the same, but that he is the sole owner of the same.

Your petitioner prays your honors to inquire into the matters aforesaid, and to grant such relief as to law and justice may appertain.

A.

Schedule of claims due William H. Russell, referred to in foregoing and annexed petition, viz:

No. 1.	Salary as collector for the district of Monterey, in California, from the 13th day of March to the 23d day of June, 1851, at $3,000 per annum, amounting to		$846 57
No. 2.	Items of charge disallowed in the settlement of his accounts as collector at Monterey by the accounting officers of the treasury, viz:		
	Amount paid William H. Cranskee for a revenue barge	$140 00	
	Amount paid in 3d quarter, 1851, for hire of boatmen, viz: to John Fox and R. Graham	600 00	
	Amount paid in 4th quarter, 1851, to same and C. Benson	308 00	
	Amount paid in 1st quarter, 1852, to Davidson & Titus	318 00	
	Amount paid from 1st April to 8th June, 1852, to R. Graham	136 00	
	Amount paid in 3d quarter, 1852, to Baronowske & Barry	414 00	
	Amount paid in 4th quarter, 1852, to J. & P. Browning	368 00	
	Amount paid for repairing revenue boat in 1st quarter, 1852, to J. Boston & Co	8 32	
	Amount paid for repairing revenue boat in 2d quarter, 1852, to J. McMahon	27 92	
	Amount paid for repairing revenue boat in 1st quarter, 1853, to D. McCarthy	16 00	
	Amount charged for travelling expenses of collector	150 00	
	Amount paid in 1st quarter, 1852, to R. Graham, as servant and porter	180 00	
	Amount paid Curtis & Little for 3 boxes candles, $30, $30, and $20	80 00	
	Amount paid steamer Ohio for freight on revenue barge from San Francisco	44 00	
			2,790 24

No. 3. His pay and emoluments as major in the Califoynia battalion from the 24th March, 1847, to 24th August, 1847, amounting to	$748 60	
For travelling allowance from the city of Washington (the place of his discharge) to Los Angelos, in California, (the place at which he received and accepted his appointment,) being 4,500 miles, a day's pay, &c., computed at, each, 20 miles, making 225 days, or 7 months and 15 days	1,117 50	
		$1,866 10

WILLIAM H. RUSSELL *vs.* THE UNITED STATES.

Opinion of the Court delivered by Judge SCARBURGH:

The petitioner was appointed collector of the customs for the district of Monterey, in California, on the 13th day of March, A. D. 1851, while in the city of Washington. He thereupon accepted the appointment, executed his official bond, "and, in obedience to the requirements of the Secretary of the Treasury, proceeded at once to the discharge of the duties assigned him." The Secretary of the Treasury advanced to him, in his official character, the sum of three thousand dollars, and caused the same to be charged to him, in that character, on the books of the treasury. Whilst he remained in the city of Washington he was constantly employed in making arrangements and receiving instructions necessary to the proper and efficient discharge of his official duties. He did not take the oath of office till the 23d day of June, A. D. 1851, after his arrival in California. His salary was paid him from the date last mentioned.

He now claims that he is entitled to receive his salary as collector from the date of his appointment and acceptance of the office, instead of from the 23d day of June, A. D. 1851. The amount claimed by him as still remaining unpaid is eight hundred and forty-six dollars and fifty-seven cents.

A collector of the customs is appointed for the term of four years, but is removable from office at pleasure.—(3 Stat. at Large, p. 582.) The collector of the district of Monterey is allowed by law a salary of three thousand dollars *per annum*, with additional *minimum* compensation of two thousand dollars *per annum*, should his official emoluments and fees provided by existing laws amount to that sum.—(9 Stat. at Large, p. 509.) Every collector of the customs is required by law, before he enters upon the duties of his office, to take and subscribe an oath or affirmation, diligently and faithfully to execute the duties of his office. The form of the oath or affirmation is prescribed by statute. It may be taken before any magistrate authorized to admin-

ister oaths within the district to which he belongs; "and being certified under the hand and seal of the person by whom the same shall have been administered, shall within three months thereafter, be transmitted to the Comptroller of the Treasury, in default of taking of which oath, or transmitting a certificate thereof, the party failing shall forfeit and pay two hundred dollars, to be recovered, with cost of suit, in any court of competent jurisdiction, to the use of the United States."—(1 Stat. at Large, p. 642.)

Every collector is also required, within three months after he enters upon the execution of his office, to give bond, with one or more sufficient sureties, to be approved of by the Comptroller of the Treasury of the United States, and payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law.—(1 Stat. at Large, p. 705)

The question now presented for consideration is, when was the office, to which the petitioner was appointed, filled—at the date of his appointment, or at the date of his taking of the oath of office?

Under the Constitution of the United States, the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." Also, "the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."—Const. of U. S , Art. II, section 2. And he "shall commission all the officers of the United States."—Ibid., Art. II, section 3.,

The act of May 15, A. D. 1820, requires, "that the commissions of all officers employed in levying or collecting the public revenue shall be made out and recorded in the Treasury Department, and the seal of the said department fixed thereto;" but that "the seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States."

In a case where the appointment to office is made by and with the advice and consent of the Senate, the Constitution of the United States plainly regards the appointment, and the commissioning of the party appointed, as two separate and distinct acts, for the power to perform them is given in two separate and distinct sections of the Constitution.—(Marbury *vs.* Madison, 1 Cranch, R. 156.)—"This is an appointment," said Mr. Chief Justice Marshall, in that case, "made by the Prsident, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseperable; it being almost impossible to show an appointment otherwise than by proving the existance of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it."

"But," he added, "at what stage does it amount to this conclusive evidence?

"The answer to this question seems an obvious one. The appoint*ment, being* the sole act of the President, must be completely evidenced,

when it is shown that he has done everything to be performed by him.

"Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

"The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction."—(1 Cranch R., 157.)

He further said: "If it should be supposed that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the the part of government. All that the Executive can do, to invest the person with his office, is done; and unless the appointment be then made, the Executive cannot make one without the co-operation of others."—(1 Cranch R., 158, 159.)

In the same case the learned Chief Justice, in discussing the question, whether the transmission or acceptance of a commission be necessary to constitute an appointment, said: "The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment which must precede it, and which is the mere act of the President. * * * If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

"That this is the understanding of the government," he further said, "is apparent from the whole tenor of its conduct.

"A commission bears date, and the salary of the officer commences from his appointment, not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

"It is, therefore," he said, "decidedly the opinion of the Court that, when a commission has been signed by the President the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State."

The petitioner, without in terms mentioning a commission, avers that his appointment was made on the 13th day of March, A. D. 1851. But we must intend that this averment includes everything necessary to a complete appointment, and, therefore, that if a commission be essential to such an appointment, it includes an averment of the regular granting of the commission. We may, too, judicially take notice that this appointment was made by the President to fill up a vacancy which had occurred during the recess of the Senate. This was done in the exercise of the power granted by the Constitution to the President, "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session." Such a vacancy, then, is filled up by the granting of a commission. As soon, therefore, as the commission is granted the office is full, and, consequently, the party must be considered as holding it from the time such grant becomes effectual. If, then, the office be held for a term of years, with an annual salary, it is manifest that the term and the salary must commence from the day the grant of the commission is completed. It is only, therefore, necessary to inquire when is such a grant completed? It is the sole act of the President, and is completed when he has put his signature to the commission, or, at most, as soon as the seal of the proper department is affixed thereto.—(Marbury *vs.* Madison.)

The act of Congress, which requires the taking of the oath of office, seems to have been framed with reference to these views. Its language is: "That all officers and persons to be appointed pursuant to this act, before they enter upon the duties of their respective offices, shall severally take and subscribe an oath or affirmation diligently and faithfully to execute the duties of their said offices respectively, which oath or affirmation shall be of the form and tenor following, to wit:

"I, (A. B.,) having been appointed (collector or other officer, as the case may be) of," &c.—(1 Stat. at Large, 641, 642.) This act assumes that the party is already in office when he is required to take this oath, because, in the nature of things, the possession of the office precedes the entering upon its duties. The statute does not declare that before the collector can become invested with his office he shall take the oath, but that before he enters upon the duties of his office he shall take the oath. It is not the entering upon the duties thereof that invests a party with an office, for he must first be in office before he can be in a condition to perform its duties. The office, therefore, must be conferred by some other means. Hence the language of the oath is: "I, (A. B.,) having been *appointed*," &c. Thus the oath itself seems to be a recognition of the doctrine of the case of Marbury *vs.* Madison, that it is the appointment which confers the office. And, moreover, the failure to take the oath of office does not invalidate the acts of the officer. The only consequence denounced by the statute is, that "the party failing shall forfeit and pay two hundred dollars." And, besides, this failure is put by the statute on precisely the same footing with the failure to transmit the certificate of the taking of the oath to the Comptroller of the Treasury; but no one will pretend that the transmission of the certificate is necessary to complete an appointment to office.

A collector, as we have seen, is required, within three months after he enters upon the execution of his office, to give an official bond. The condition of the bond, like the oath of office, recites the appointment: "Whereas the President of the United States hath, pursuant to law, appointed the said ———, to," &c. The statute which requires the bond, like the one prescribing the oath of office, assumes that it is the appointment which confers the office. It requires, too, that the bond shall be executed, not within three months after the date of the appointment, but within three months after the collector enters upon the execution of his office. It thus recognises the principle already adverted to, that he must be invested with his office before he can enter upon its duties.

It may not be improper here to add, that a practical illustration of the views of the Treasury Department as to the necessity of a collector's taking the official oath in order to invest him with his office, is shown by this very case; for before the petitioner took the oath, his official bonds were accepted, and the Secretary entrusted to him in his official character a large sum of money.

Our opinion is, that the salary of the petitioner ought to commence from the date of his appointment.

There are two other claims presented in the petition, but we do not deem it necessary to make any decision in regard to them before the testimony shall be brought in.

Let an order be made directing the taking of testimony in this case.

IN THE COURT OF CLAIMS.

ON THE PETITION OF WILLIAM H. RUSSELL.

Brief of the United States Solicitor.

This is a claim (1) for salary as collector at Monterey, not paid till he took the oath at Monterey. He claims the pay from the date of appointment.

2. Charges disallowed.

3. Expenses of travel to Fulton.

1. Date of commission, March 13, 1851. The Court has already decided that he is entitled to pay from date of the commission.

2. Charges &c. The principal of these is for the purchase and maintaining of a small boat. The purchase was not authorized by the Treasury Department. This is indispensable to authorize the allowance.—(See report of the Commissioner of Customs, and opinion of the justice in case United States *vs.* White, referred to in case recently before this Court on petition of White.)

b. It was not necessary.—(See Edwards's deposition and report of commissioner.)

c. There is no proof that the boat was bought, or that men were hired and paid for manning the boat.

d. The expense connected with Russell's administration is referred to, to show the unscrupulousness of his charges. Whilst it may be

true that the expense being greater than the income is not a reason why this office of collector should be abolished, and the custom-house closed, the amount of the income, &c., is a fact, showing that fewer inspectors and smaller expenses were necessary.

3. The claim for travelling expenses, &c. Russell was neither in the military nor civil service of the government at the date of his discharge. It appears from the papers that Kearney had ordered the discharge of all those in the battalion on 1st March, 1847.

The order to Russell was not in a military capacity.

The muster-rolls (see Clayton's letter) show that he was not borne on the rolls as in the military service for the period for which he claims, and the answer of the attorney, Burgess, which may be again pressed, that Russell was on special service, does not explain the omission of his name from the rolls. Clayton says that the law authorizes payment only according to the rolls. This Court is as much controlled by this law, as the Auditor; so that, if in fact Russell was in service, the law only authorized payment to such of the battalion as were borne on the rolls, and only *legalized* the claim *to that extent.*

As to the claim for travelling expenses.—(See the reason of the Auditor for disallowing them.) It is manifest that Russell was discharged in California. It was in California he was enlisted. The Auditor reports that the uniform construction of the law has been, that under the laws on the subject, mileage is paid on the discharge of officers and men to the places at which they were enlisted.

M. BLAIR,
U. S. Solicitor.

IN THE COURT OF CLAIMS.

WILLIAM H. RUSSELL *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner presents, in his petition, three claims: The first is for his "salary as collector for the district of Monterey, in California, from the 13th day of March to the 23d day of June, 1851, at $3,000 per annum, amounting to $846 57." When this case was submitted on the preliminary question, whether testimony should be ordered, we held that the petitioner was in office, and entitled to his salary from the date of his appointment. In regard to the other two claims, we said: "We do not deem it necessary to make any decision in regard to them before the testimony shall be brought in."

I. As to the first claim, the facts are, that the petitioner was appointed collector of the customs for the district of Monterey on the 13th day of March, A. D. 1851; that he took the oath of office on the 23d day of June, A. D. 1851; and that his salary was paid him only from the latter date.—(See the letter of Elisha Whittlesey, Comptroller, to the petitioner, dated March 3, A. D. 1851; the letter of W. L. Hodge, Acting Secretary of the Treasury, to same, dated March 14, A. D. 1851; the letter of the Commissioner of Customs to the same, *dated* April 14, A. D. 1854; and the letter of the Commissioner of

Customs to the Secretary of the Treasury, dated January 13, A. D. 1855.) We are of the opinion that the petitioner's salary ought to have commenced on the day of his appointment, and that there is now due him, on this account, the sum of eight hundred and thirty-nine dollars and sixty-six cents. Our reasons for this opinion are given in our former opinion.

There is on file amongst the papers in this case a number of letters, marked "1," "2," "3," "4," "5," "6," "7," "8," "9," "A," "B," "C," "D," "E," "F," "G," which we do not consider admissible in evidence. We have, therefore, not considered them.

II. As to the second claim: Upon the question whether a revenue boat was necessary, there is some conflict in the evidence. The petitioner's predecessor was in office more than three and a half months, and the expenses incurred by him for boat and boatmen were only eight dollars; and his successor, in the first seven months of his official term, incurred for boat and boatmen an expense of only fifteen dollars.—(See the letter of the Commissioner of Customs to the Secretary of the Treasury, dated May 8, A. D. 1854) In considering the question as to the necessity of a revenue boat at Monterey, these facts would be entitled to grave consideration. But no act of Congress, nor any regulation of the Treasury Department, authorizing the petitioner to procure and man such a boat, has been cited, and we are not aware that any such act or regulation exists. The Secretary of the Treasury may have the power to direct the purchase of such a boat, and the employment of persons to man it, but he alone has authority over these matter. Without his sanction, we think that the United States cannot be made liable for any expense which may be incurred by a collector in regard to them.—(See opinion of the circuit court of Maryland in The United States *vs.* White, on file in this case.) It is proper for us to add, that there is evidence before us that such a boat was in the possession of the petitioner, and used by him for revenue purposes; but there is no evidence how it came into his possession, or what he paid for it, or what was its value, or what became of it after he went out of office, or what he paid to the persons by whom it was manned. There is some evidence as to the prices paid such men for such services at that time in California.

As to the charge for travelling expenses of collector, ($150) it is not stated in the petition where, or on what business, the petitioner travelled; nor is there any evidence before us on this point.

As to the charge for candles. There is no evidence before us that this expense was actually incurred, or that the candles were necessary to enable the petitioner to perform his official duties.

We do not think that the second claim has been sustained.

III. As to the third claim:

By the sixth section of the act of Congress, entitled "An act making appropriations for the support of the army for the year ending the thirtieth of June, one thousand eight hundred fifty-three," it is provided: "That for the pay and equipment as mounted riflemen, finding their own horses and forage, of the volunteers serving under the command of Captain John C. Frémont, in Cali-

fornia, during the year eighteen hundred and forty-six, as appears by the muster-rolls on file in the War Department, and for the subsistence and supplies consumed by said volunteers in said service, one hundred and sixty-eight thousand dollars is hereby appropriated, and the Secretary of War is authorized and empowered to appoint three competent and disinterested officers of the army to examine and report to Congress upon all such claims as may be presented for funds advanced and subsistence and supplies of all kinds furnished or taken for the use of said command whilst thus engaged in the public service; and for the expenses of said board of officers the sum of two thousand dollars is hereby appropriated."—(10 Stat. at L., p. 108.) This act is in its very terms confined to services rendered in the year eighteen hundred and forty-six. But the fourth section of a similar appropriation act, for the year eighteen hundred and fifty-five, is as follows: "That the Secretary of War be, and he is hereby, authorized and directed to receive and cause to be placed on the files of his department, such additional muster-rolls of the battalion of volunteers commanded by Lieutenant Colonel J. C. Frémont, in California, duly authenticated by the proper officers, as have not been heretofore received and filed, and to cause such correction of the muster-rolls to be made in regard to the periods of enlistment and terms of service, and the omission of names of the members of said battalion, as upon satisfactory proof he may deem right and proper, and as far as practicable to correspond with the pay-rolls of Major P. B. Reading, paymaster of said battalion, with respect to the period of service, so that all who served in the military service of the United States in California, during the late war with Mexico, whether under the command of naval or military officers, may be entitled to all the benefits of all the acts of Congress providing for the enrolment of volunteers in the Mexican war: *Provided*, That no payment shall be made in consequence of this section beyond the sum heretofore appropriated."—(Ibid., p. 582.)

There can be no doubt, we think, that the volunteers under Lieutenant Colonel Frémont were dependent entirely on the will of Congress as regards compensation for their services, and that their legal rights are to be measured by the acts of Congress which have been passed for their relief. To entitle a party to the benefit of those acts he must bring himself within the terms prescribed by them. Under the first act above quoted, his name must appear on the muster-rolls on file in the War Department at the time of its passage; and under the second, his name must appear on such of the muster-rolls therein mentioned as the Secretary of War may cause to be placed on the files in his department; or if his name has been omitted, he must seek to have the omission corrected by the Secretary of War, the officer entrusted with this duty, in the manner prescribed by that act. This being done, a further pre-requisite is, that the claim can properly be paid out of the appropriation made by the act first above mentioned.

The Second Auditor of the Treasury Department, in his letter to Richard Burgess, of the 9th day of December, A. D. 1852, says: "On an examination of the vouchers, the only service I find of Cap*tain* William H. Russell, an ordnance officer, is from October 8, 1846,

to January 21, 1847. The claim now presented is for services from 24th March to 24th August, 1847."

"Inasmuch, therefore, as the period of time embraced in the claim now presented for consideration does not accord with any muster or pay-rolls on file in the War Department, (now on file in this office,) nor with any vouchers, I have no other alternative but to reject the claim."

This, it seems to us, was a conclusive answer to the petitioner's claim; and it stands now in no better attitude before us. The same objection still continues, and whilst it exists we cannot say that the petitioner has a legal demand against the United States. It is true that the petitioner has in fact been paid for his military services up to and inclusive of March 23, A. D. 1847.—(See copy of voucher, certified by the Second Auditor.) But the only effect of this is, that it may be a just inference from it that the petitioner was in service at least till that time, and it might, therefore, be used as evidence before the Secretary of War, to show that he is entitled to have his name placed on the muster-rolls up to that period. Even if we can consider that as done, which ought to be done, and are at liberty to regard the petitioner's name as actually on the muster-rolls up to and inclusive of the 23d day of March, A. D. 1847, still we have no means of determining the petitioner's title to continue his name on the muster-rolls after that time.

On the voucher above referred to there is the following endorsement made by the Adjutant General: "The records of the Adjutant General's office do not enable me to decide whether Major William H. Russell is, or is not at this time, in the service of the United States as a major of the California battalion, raised on the emergency, by Lieutenant Colonel Frémont, in the autumn of 1846. It appears that Major Russell left California in March, with despatches for the War Department, under orders from Lieutenant Colonel Frémont, which orders do not require him to return to California. They are addressed to him not as a major of the battalion, but to 'W. H. Russell, esq., secretary of State of California.'" Now, this Court is in the same condition. There is no evidence before us to show whether the petitioner continued a member of the battalion raised by Lieutenant Colonel Frémont after the 23d day of March, A. D. 1847, or not. When, or how, or where he ceased to be a member of that battalion, the evidence now before us in this case does not enable us satisfactorily to determine.

For these reasons we cannot sustain the petitioner's third claim.

A BILL for the relief of William H Russell.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the Treasury not otherwise appropriated, to pay to William H. Russell, the sum of eight hundred and thirty-nine dollars and sixty-six cents in full for his salary as collector of the port of Monterey, in California, from the 13th day of March to the 23d day of June, 1851.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 40.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ALMIRA RENIFF *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ALMIRA RENIFF *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Almira Reniff, of the county of Crawford, and State of Pennsylvania, respectfully represents that she is the widow of Charles Reniff, deceased, who was a sergeant in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Charles Reniff subsequent to

the 1st day of January, 1800, and has been allowed a pension at the rate of one hundred and twenty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans; which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

_____,
Justice of the Peace.

IN THE COURT OF CLAIMS.

ALMIRA RENIFF, }
vs. }
THE UNITED STATES. }

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Charles Reniff, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of one hundred and twenty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Almira Reniff, of the county of ———, State of Pennsylvania.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Almira Reniff, the widow of Charles Reniff, deceased, a sergeant in the army of the revolution, the sum of $590, being for the arrears of her pension, at the rate of $120 per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 41.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SARAH WEED *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

SARAH WEED *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Sarah Weed, of the county of Albany and State of New York, respectfully represents that she is the widow of Smith Weed, deceased, who was a commissary in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Smith Weed subsequent to the 1st

day of January, 1800, and has been allowed a pension at the rate of six hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half pay to certain widows and orphans; which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853; whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853; upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 16th day of February, 1857, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

——— ———,
Justice of the Peace.

IN THE COURT OF CLAIMS.

SARAH WEED *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that Smith Weed, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension, at the rate of six hundred dollars per annum, commencing on the 3d of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension, from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Sarah Weed, of the county of Albany, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Sarah Weed, the widow of Smith Weed, deceased, a commissary in the army of the revolution, the sum of two thousand nine hundred and fifty dollars, being for the arrears of her pension at the rate of six hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 42.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JANE MARTIN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.
[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

JANE MARTIN *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Jane Martin, of the county of Harrison, and State of Virginia, respectfully represents that she is the widow of William Martin, deceased, who was an assistant commissary in the war of the revolution, and who died on the 25th of August, 1851.

She further states that she was married to the said William Martin subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of six hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 25th of August, 1851, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this ——— day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

JANE MARTIN *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he states that there is evidence on file in the Pension Office that William Martin, her husband, died on the 25th of August, 1851, and that she has been allowed a pension at the rate of six hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 25th of August, 1851, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Jane Martin, of the county of Harrison, State of Virginia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Jane Martin, the widow of William Martin, deceased, an assistant commissary in the army of the revolution, the sum of eight hundred and sixty-six dollars and sixty cents, being for the arrears of her pension, at the rate of six hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 43.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received from the Court of Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ELIZABETH MORGAN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Commissioner of Pensions, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ELIZABETH MORGAN *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Elizabeth Morgan, of the county of Rensselaer, and State of New York, respectfully represents that she is the widow of Ephraim Morgan, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Ephraim Morgan sub-

sequent to the 1st day of January, 1800, and has been allowed a pension at the rate of six hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

On this 21st day of February, 1857, personally appeared before me, the undersigned, chief clerk of the Court of Claims, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

IN THE COURT OF CLAIMS.

ELIZABETH MORGAN *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 23, 1857, in which he state that there is evidence on file in the Pension Office that Ephraim Morgan, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension at the rate of six hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Elizabeth Morgan, of the county of Rensselaer, State of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary

of the treasury be, and he hereby is directed, out of any money in the treasury not otherwise appropriated, to pay to Elizabeth Morgan, the widow of Ephraim Morgan, deceased, an officer in the army of the revolution, the sum of $2,950, being for the arrears of her pension, at the rate of six hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

34TH CONGRESS, 3d Session. } SENATE. { MIS. DOC. No. 45.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee of Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ROBERT HARRISON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's petition to Congress, referred by the Senate to the Court of Claims and returned to the Senate.
3. Argument of United States solicitor and claimant's counsel to submit the case on the briefs and arguments in the case of Letitia Humphreys *vs.* The United States.
4. Claimant's briefs and arguments in the case of Letitia Humphreys.
5. United States solicitor's briefs in same case.
6. Judge Gilchrist's opinion adverse to the claim, with his opinion in the case of Letitia Humphreys.
7. Judge Blackford's opinion adverse to the claim, with his opinion in the case of Letitia Humphreys.
8. Judge Scarburgh's dissenting opinion, with his dissenting opinion in the case of Letitia Humphreys.
9. The record of the proceedings of the judge of the superior court of the district of East Florida, with the action of the Secretary of the Treasury thereon, was received from the treasury department, and has been returned.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this seventh day of December, A. D. 1857.
[L. S.]

S. H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

To the Court of Claims:

The petition of Robert Harrison, of Duval county, in the State of Florida, respectfully represents:

That during the years 1812 and 1813, and previous and subsequent thereto, he was a Spanish subject and an inhabitant of East Florida, then a Spanish province and dependency of the Crown of Spain; that his principal occupation was that of a planter, which occupation he has continued to follow up to the present time; that during the said years 1812 and 1813, while a state of peace existed between the United States and Spain, East Florida was invaded by the military and naval forces of the United States, acting under the orders and authority of the government of the United States; that the said invasion was in open and acknowledged violation of the law of nations and of the treaty then existing between the two governments; that the most wanton and indiscriminate destruction of the property of the Spanish officers and Spanish inhabitants was occasioned by the operations of the American army in East Florida during those years; that, for the purpose of securing to the sufferers that full indemnity for those injuries which the law of nations authorized Spain to demand, the following provision was inserted in the 9th article of the treaty concluded between the United States and Spain on the 22d day of February, 1819, viz:

English version:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

The Spanish version of this article does not contain the word "*late*," but reads simply, "*by the operations of the American army in the Floridas*," that is, in both East and West Florida.

Spanish version:

"Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufridq por las operaciones del Exercito Americano en ellas."

(8 Statutes at Large, p. 260.)

The English side of the treaty requires the injuries to be established "by process of law," which are the precise technical words of the common law, to signify a judicial proceeding. These words were, undoubtedly, borrowed from the common law, to signify a judicial proceeding which was to take place under our own municipal laws, and before our own courts or judges, and must, by a well-established rule of construction, be referred to that code for their meaning.—(3 Wash. C. C. Rep. 209, Smith *vs.* Jones; 1 Wash. C. C. Rep., p. 56, Hurst *vs.* Hurst, and authorities generally.)

But all doubt on this point is now removed by the translation of the Spanish side of the treaty, recently obtained at the instance of his honor Judge Scarburgh. The equivalent words in the Spanish are, *by that translation*, "shall *judicially* prove according to law."

The translator on the part of the government says: "The transla-

tion might be varied, and the meaning still preserved; but to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by *judicial proceedings* of some kind."—(For translations, see note to Judge Scarburgh's opinion in the case of Humphreys, administratrix of Atkinson, pp. 28, 29.)

In the case of the United States *vs.* Perchman, (7 Peters, 51,) in commenting on the English and Spanish parts of the 8th article of the same treaty, Chief Justice Marshall said:

"The treaty was drawn up in the Spanish as well as in the English language. Both are *originals*, and were undoubtedly intended by the parties to be identical. * * If the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail."

By this clause of the treaty the United States became solemnly bound to give the claimants an opportunity to "establish" their claims (*i. e.*, both the fact of injury and the amount of the injury) *judicially*, and to satisfy, by payment, the amount which should be so established. That Congress so understood the obligations of the treaty, is proved by the provisions of the acts passed to carry it intoeffect.

The first act was passed on the 3d March, 1823, and is entitled "An act *to carry into effect* the ninth article of the treaty concluded between the United States and Spain," &c.—(3 Statutes at Large, p, 768.)

The first section of this act directed the federal judges in Florida, (previously appointed and commissioned as *judges* according to the Constitution, and possessing a full federal jurisdiction in all cases arising under the Constitution and laws of the United States,) "within their respective jurisdiction," to receive and adjust these claims "agreeably to the provisions of the 9th article of the *treaty* with Spain."

The 2d section required the judges to report their decisions, when *in favor* of the claimants, (not otherwise, decisions *against* them being *final*,) to the Secretary of the Treasury, with the evidence, to enable him to see that they were "within the provisions of the treaty," (or "just and equitable within the provisions of the *treaty*," which is the same thing;) and if they were found to be so, he was required to "pay THE AMOUNT THEREOF"—nothing more and nothing less—out of any money in the treasury not otherwise appropriated.

This act is thus expressly declared, on its face, to be auxiliary and subsidiary to the *treaty*. By the 1st section, the claims are to be adjudicated ("established") by the *judges* in Florida, as the treaty required; and, by the 2d section, they are to be *paid* (not adjudged) by the Secretary of the Treasury; and "the provisions of the *treaty*" are made the law by which both are to be governed.

Under this act, Secretary Crawford held that the losses occasioned by General Jackson's entrance into West Florida, in 1814, to expel the British and Indians, being justified by the law of nations, during our war with England, were not within the 9th article of the treaty of 1819 with Spain; and Secretary Rush having applied this decision to the losses of 1812 and 1813 in East Florida, Congress, on the 26th June, 1834, passed an explanatory act, entitled "An act for the relief of certain inhabitants of East Florida."—(6 Stat. at Large, p. 569.)

This act was passed to *reverse* and *correct* the decision of Secretary

Rush, that the claims of 1812 and 1813 were not within the treaty. The 1st section of that act directs the payment of the decrees of the judges for losses in those years, which had been previously made, and rejected by the Secretary, with provisoes to guard against the payment of claims which were not found to be within the provisions of the treaty.

The 2d section authorizes the judge to "receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 *and* 1813, not heretofore presented to the said judge, or in which the evidence was withheld *in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February* 22, 1819, *between the governments of the United States and Spain*, subject to the provisoes aforesaid, and to the further proviso that the claim should be presented to the judge within one year from the passage of the act.

Under the above provisions of the treaty, and acts passed to "carry it into effect," the claims in question have been adjudicated. Each claimant presented his claim by petition, verified by oath, and alleging, as required by the rules prescribed by the court, (see Rules, by Judge Reid,) the nature and extent of his losses, and the facts necessary to show that the claim was within the provisions of the treaty. The judge examined the witnesses when personally brought before him, and, when their testimony was taken by deposition, he selected and instructed the commissioners, and propounded cross-interrogatories to the witnesses, as is shown by the record on file in this case, and the records remaining on file in the Treasury Department.

All the evidence was recorded, and a copy of it, and of the decree of the judge, when "*in favor of the claimants*," was reported to the department for payment, as required by the act of 1823.

In making up his awards or decrees, the judge allowed, as a just and proper measure of damages under the law of nations necessary to fulfil the stipulations of the treaty, the proved value of the property at the time of the injury or loss; and, by way of satisfaction for the further loss of the use, fruits, or profits of the property, whilst wrongfully deprived of them, and of the just satisfaction for them which the law of nations required; and, during the period that no provision of law existed for the presentation and payment of said claims, he added five per cent. interest, by way of damages, and as an equitable measure of damages, to the original value of the property, (being the legal rate of the country,) and made a formal decree that the United States pay the same to the claimants. The decrees thus made *in favor of the claimant* were, as before stated, reported to the Secretary of the Treasury for payment; when *against him*, they were deemed *final*, and were never reported to the Secretary or heard of afterwards.

That when the decrees of the judge, allowing this legal measure of damages under the treaty and law of nations—which governs treaty obligations—were first presented to Secretary Woodbury, in December, 1836, he, instead of paying the *amount of the decree*, as required by the 2d section of the act of 1823, in cases found "*within the provisions of the* TREATY," claimed the right to go fully into the merits of the claims upon the evidence reported, and called upon the judge *for further* evidence wherever he entertained doubt. In regard to the

damages decreed for the loss of the use and fruits of the property, it was rejected, in all instances, under the mere *usage* of the Treasury Department in reference to domestic pecuniary demands, (which the government assumes to be always ready to pay,) without any reference to the treaty, the law of nations, or the express directions of the act of 1823, which required the Secretary, when he paid at all, to pay the *amount* of the decree. The claims seem never to have been considered with any reference whatever to the treaty or the law of nations, until Mr. Secretary Walker's reference to the Attorney General, in 1849. All the previous references related to the mere usage of the department in regard to domestic accounts. Since that period, the *precedent* of Mr. Secretary Woodbury's decision, in 1836, has been set up as a bar to the consideration of these claims under the treaty and the law of nations; and the claims have been referred by the Secretary to Congress, with an opinion of the Attorney General substantially conceding the correctness of the measure of damages awarded by the judges, but advising the Secretary to adhere to the precedents under the departmental usage, until further legislation by Congress.

The petitioner further represents, that, after the passage of the aforesaid act of the 26th June, 1834, he filed his petition, under oath, before the proper judge, setting forth his claim, amounting to the sum of $22,160; and also setting forth all the facts necessary to bring the same within the provisions of the treaty, and within the jurisdiction of the said judge, and in the manner prescribed by law and the rules of the court, and within the time limited by said act of 26th June, 1834; and prayed that said claim might be adjudicated by the said judge, and such adequate indemnity awarded as to him might seem reasonable, with interest on the amount of the losses from the date of their occurrence. That the said judge took jurisdiction of the said case, and thereupon such evidence was taken, and such judicial proceedings had, that on or before the third day of September, 1837, the judge made his final decree in favor of this petitioner for the sum of $9,214, (an amount far less than his evidence warranted, and less than one-half of his actual losses,) *with an interest of five per centum per annum* from the 10th day of May, 1813; which decree and proceedings, with the evidence, duly certified by the said judge on the said 3d day of September, 1837, were immediately reported by him to the Secretary of the Treasury for payment, as provided by law—all of which will fully appear by the record remaining on file in the Treasury Department, and for which this honorable court is respectfully requested to call, as the Secretary of the Treasury declines furnishing the same, or even a certified copy thereof, to the petitioner, until such call shall be made by this honorable court.

That on the receipt of the said record and proceedings at the Treasury Department, payment in full of the said decree was demanded by the petitioner; but the Secretary of the Treasury, the Hon. Mr. Woodbury, applying the principles and practice hereinbefore set forth, refused such payment in full, though all the items of claim embraced by the decree were conceded to be within the provisions of the said treaty; but, on the 25th day of October, 1837, he approved and directed the payment of the sum of $7,500 without interest, that sum being deemed a reasonable remuneration for the losses, as proved by

the evidence adduced; and that amount was accordingly paid on the 27th of October, 1837.

That afterwards, in the year 1852, the then Secretary of the Treasury referred the question of the right of this petitioner to the payment of the residue of the said sum of $9,214, decreed as the original value of the property, to the Solicitor of the Treasury for a report thereon. That, on the 12th of March, 1852, the said solicitor made a report in favor of such payment, which was fully concurred in by a report of the assistant to the Secretary of the Treasury, (J. N. Barker, esq.,) dated the 2d September, 1852, upon consideration of which reports and of the case, the said Secretary directed payment of the residue of the amount decreed by the judge as the original value of the property; and the same was accordingly paid.

The remainder of the said decree, being the damages awarded by said judge under the name of interest, for the loss of the use and fruits of the property, in strict accordance with the obligations of the said treaty, was again rejected under Mr. Woodbury's precedent of applying departmental usage in cases of pecuniary domestic accounts to cases arising under a treaty stipulating "satisfaction" for injury to property, instead of the law of nations, which alone governs such cases, and still remains due and unpaid. All which will appear by the record of the action of the Secretaries in this case remaining on file in the Treasury Department, and which the petitioner prays may be called for by this honorable court, for the reasons before stated, in relation to the judicial record.

The petitioner therefore begs leave to represent to this honorable court that though two learned Attorneys General, a learned Solicitor of the Treasury, and the judge of the district court of the United States for the northern district of Florida, upon a full review of all the questions involved in this case and others of the same class, have decided that the measure of damages decreed by the judge in this case is the just and proper one to which the claimants are entitled under the treaty and law of nations, and under the acts of Congress passed to carry the treaty into effect, and have conceded the error of Mr. Woodbury in applying the departmental usage to treaty cases, instead of the law of nations; and though every former Secretary and Attorney General who has acted on these cases has united in this opinion, still the erroneous rule established by Mr. Woodbury, in violation of the treaty, the acts of Congress, and the law of nations, has been holden to be binding upon his successors until Congress should interpose. That the acts passed to carry the treaty into effect have been construed without reference to the treaty, and in such a manner as to defeat the very object for which they were passed; that the law which is conceded to govern these cases, and by which the legality and justice of the judge's decree in this and the other cases are to be decided, has never been applied to them; that the claimants do not ask the payment of the damages decreed under the name of interest, on any ground on which its payment is prohibited by the usage of the Treasury Department, but as a part of the actual damages decreed and reported by the judge, and which the treaty and acts bind the United States to pay, as imperatively as the original value of the property, and the payment of which the *usage of the* department does not touch.

The petitioner, therefore, respectfully represents to this honorable court that he hath obtained, "by process of law," a just and valid judgment establishing the amount of the injury occasioned by the operations of the American army in East Florida, to the petitioner, in the years 1812 and 1813; which, by the treaty and acts of Congress before stated, the Secretary of the Treasury was required to pay, and which the government is still bound to pay: 1. Because the Secretaries of the Treasury, by their approval and payment of the whole amount decreed by the judge as the original value of the property at the time of its loss, have themselves affirmed the right of the claimant, under the acts passed to carry the treaty into effect, to the payment of the whole amount of said decree. 2. Because the said decree, being thus shown by the evidence reported, to be "within the provisions of the treaty," and consequently within the jurisdiction of the judge, was final and conclusive, and the Secretary was expressly directed to "pay *the amount thereof*, out of any money in the treasury not otherwise appropriated." 3. Because the portion of the decree which remains unpaid is right and just, and an essential part of the "satisfaction" for which the treaty stipulated; and because the measure of damages decreed by the judge is in accordance with the rule of satisfaction uniformly recognized by the United States in their diplomatic intercourse, and in the construction of their treaties with other nations containing similar stipulations; and is uniformly sanctioned, as the only just rule, by every source of authority, whether elementary, judicial, or diplomatic; and is, in fact, the most modified rule of satisfaction for injury to property known to the common, civil, or public law.

That even if the judges could and did act as *commissioners*, without ever having been constitutionally appointed, commissioned, or sworn as commissioners, (*which the Supreme Court declared they could not*,) still, no one has ever decided, or intimated the opinion, that the Secretary acted as a *commissioner*. He manifestly acted in his capacity of Secretary of the Treasury, in which alone he had been appointed, commissioned, and sworn, and in which alone *he was authorized to pay money out of the treasury*.

Though the treaty did not create a tribunal to establish the claims under the 9th article thereof, yet, as it stipulated for a *judicial establishment of the claims*, all other tribunals, except a judicial one, were as distinctly excluded as if they had been expressly excluded by the positive provisions of the treaty; and a *judicial tribunal* to establish them was as clearly provided for as if some particular judicial tribunal had been named in the treaty, as a board of commissioners was named in the 11th article. The United States, therefore, was not left free to establish any tribunal it pleased, or any tribunal but a judicial one. They might refuse to execute the treaty; or they might create a tribunal different from that promised; but a refusal to execute the treaty could not be set up as a fulfilment of it; nor could the action or decision of a tribunal different from that required by the treaty be claimed to be a fulfilment of the treaty stipulation; nor could the attribute of *finality* be ascribed to its decisions any more than it could to the decisions of an executive officer, if one had been substituted for the board of commissioners provided for by the 11th article of the treaty. The *treaty tribunal*, under the 11th

article, was a board of commissioners; and the only tribunal that can be considered a *treaty tribunal* under the 9th article must be a *judicial* tribunal of some kind. None other can fulfil the treaty stipulation for a judicial establishment of the claims. A tribunal totally different from that provided for by the treaty cannot, in any just sense, or with any semblance of good faith, be considered a treaty tribunal. A treaty tribunal must be one created in conformity to, and of the character provided for by the treaty, and not one created in violation of the treaty.

The Secretary of the Treasury was no part of a treaty tribunal agreed upon by the 9th article of the treaty of 1819; therefore his decision, *allowing less than the treaty called for*, cannot be final.

The petitioner further represents, that he caused a memorial to be presented to the 33d Congress, in this case, praying for the faithful execution of the 9th article of the treaty of 1819, by the payment of the residue of the decree made in his favor, as aforesaid, in which the merits of his claim were set forth substantially as they are in this petition. That his memorial was referred to the Judiciary Committee, both in the Senate and House of Representatives. That a strong report, affirming the right of the claimants under the treaty to the payment of the full amount of the decrees of the judges, and in favor of the legality and justice of the measure of damages decreed by them, was made by the Judiciary Committee of the House, accompanied by a joint resolution requiring the Secretary of the Treasury to pay the said decrees in full out of the general appropriation made by the acts of 1823 and 1834, passed to carry the treaty into effect. This resolution was laid on the table through the misapprehension and consequent *opposition* of a single member by a vote of 89 to 104, after having been taken up, out of its order, by a vote of 118 to 54.—(Report No. 33, H. R., 2d session 33d Congress; House Journal, same session, pp. 368 to 378.)

No report was made by the Judiciary Committee of the Senate; but the joint resolution, reported in the House of Representatives, was offered in that body as an amendment to the civil and diplomatic appropriation bill near the close of the session, and after it had been laid on the table in the House of Representatives and was rejected, the two senators who opposed the amendment urging the propriety of referring it to the *Court of Claims* for a judicial decision upon the legal questions involved in this class of cases.

The petitioner further represents, that after the decision of this honorable court upon the reargument in the case of Letitia Humphreys, administratrix of the estate of Andrew Atkinson, deceased, (which was presented to this honorable court without a reference by either House of Congress,) and after the report of the court in that case had been made to the Senate and referred to its Committee of Claims, the petitioner having ascertained, from the decision in that case, that the majority of the court had not felt authorized to consider whether the "satisfaction" stipulated by the treaty "entitles the claimant to the interest" awarded by the judge, "or whether the mode provided by the act of Congress for the settlement of the claim is such a 'process of law' as the treaty contemplates," and that one of the honorable *members* of the court expressed an inclination to agree with the

views expressed by his honor Judge Scarburgh, in his dissenting opinion in relation to the meaning and effect of the word "satisfaction" in the treaty; thus showing that the decision of the court in that case was not based upon the rights of the claimant under the *treaty*, but upon the *acts* of Congress passed to carry the treaty into effect, and leaving the justice and validity of the said claim under the treaty undecided; and believing that no imperfection in the provisions, or in the construction or execution of acts passed for the professed purpose of carrying the treaty into effect, could impair the right under the treaty, or justify its non-fulfilment, this petitioner caused a memorial to be presented to Congress, stating that his rights in this case depend exclusively upon the provisions and true construction of the 9th article of the said treaty, and involve a decision of the question of law, viz: Whether the "satisfaction" stipulated to be made by the United States in the said article for the injuries to property therein named requires the payment of the residue of the decree made in his favor by the judge of the superior court for the district of East Florida? He therefore prayed that the TREATY might be fully executed by the payment of the residue of the said decree; and that, if deemed proper by their honorable bodies, the memorial heretofore addressed to them, as before stated, might be taken as a part of that then presented, and the same *referred to the Court of Claims for a decision upon his rights under the said article of the treaty.*

At the same time a memorial to Congress in the case of Letitia Humphreys, administratrix of Andrew Atkinson, deceased, was presented to the Senate, setting forth the decision of this court in that case, and stating that the right of the claimant depended *exclusively upon the stipulations of the said treaty;* and that as her case had been disposed of by this honorable court, without a decision upon the rights of her intestate, under the stipulations of the said treaty, upon which alone they depended; thus leaving the merits of her claim undecided, and praying that the report of this honorable court in that case might be taken as a part of her memorial, and the same referred back to this honorable court for a decision under the treaty, in pursuance of the authority given to each house of Congress by the act creating the court.

Both of these memorials were referred by the Senate to its Committee of Claims, to which the report of this honorable court in the case of Humphreys, administratrix of Atkinson, had been previously referred, and were fully considered by the said committee in connexion with that case. In pursuance of which a resolution was reported to the Senate by said committee, providing for the reference of the case of this petitioner to this honorable court, as prayed for by him. This resolution passed the Senate, and in pursuance thereof the papers with the resolution have been transmitted to this court.

The petitioner therefore prays this honorable court to take cognizance of the case, and to make a decision and judgment establishing his right under the said treaty to the residue of the decree made in his favor as aforesaid, and for such damages, by reason of its non-payment, as to the court may seem right and just; and as in duty bound he will ever pray.

ROBERT HARRISON,
By his Attorney in fact,
CHA. E. SHERMAN.

CITY OF WASHINGTON,
District of Columbia, to wit:

Personally appeared before the undersigned, a justice of the peace in and for the county aforesaid, Charles E. Sherman, of said city and county, who, having been first duly sworn, saith, that the matters and things set forth in the foregoing petition are true to the best of his knowledge and belief.

CHARLES E. SHERMAN.

Sworn to before me, this sixth day of December, 1856.

F. J. MURPHY, *J. P.*

To the Senate and House of Representatives of the United States of America in Congress assembled:

The memorial of Robert Harrison, a citizen of East Florida, respectfully represents to your honorable bodies that the 9th article of the treaty of 1814 between the United States and Spain remains in fact unexecuted, as stated by this memoralist in his petition heretofore filed in behalf of himself and others, and now remaining on file in your honorable bodies. That his rights depend exclusively upon the provisions and true construction of the said article of the treaty, and involve a decision of the question of law, viz: whether the "satisfaction" stipulated to be made by the United States, in said article, for certain injuries to property therein named, requires the payment of the residue of the decree made in his favor by the judge of the superior court for the district of East Florida, under the acts passed to carry said article of the treaty into effect. He therefore prays that the said treaty may be fully executed by the payment of the residue of the said decree; and that, if deemed proper by your honorable bodies, that the memorial heretofore filed by him may be taken as a part of this memorial, and the same referred to the Court of Claims for a decision upon his rights under the said article of the treaty; and, as in duty bound, he will ever pray, &c.

ROBERT HARRISON,
By his attorney in fact,
C. E. SHERMAN.

COURT OF CLAIMS.

ROBERT HARRISON, a claimant under the 9th article of the treaty of 1819 with Spain,
vs.
THE UNITED STATES.

It is agreed that the above case be referred to the court for decision upon the briefs and arguments in the case of Letitia Humphreys, administratrix of Andrew Atkinson, deceased.

M. BLAIR,
Solicitor of the United States.
CHAS. E. SHERMAN,
Attorney for Petitioner.

WASHINGTON, December 11, 1856.

UNITED STATES COURT OF CLAIMS.

BRIEF.

LETITIA HUMPHREYS, ADMINISTRATRIX OF THE ESTATE OF ANDREW ATKINSON, DECEASED, A CLAIMANT UNDER THE NINTH ARTICLE OF THE TREATY OF 1819 BETWEEN THE UNITED STATES AND SPAIN,

vs.

THE UNITED STATES.

This is one of a class of cases arising under the 9th article of the treaty of February 22, 1819, between the United States and Spain, and the acts of Congress passed to carry it into effect.

The petition in this case is founded on a decision and judgment in favor of the estate of the said Andrew Atkinson, deceased, made by the Judge of the superior court established at St. Augustine, in the late Territory of Florida, under the treaty and acts aforesaid; and is filed to recover the unpaid portion of said judgment.

The proceedings and judgment in favor of the said Atkinson's estate are shown by the record sent from the Treasury Department and on file in this case.

The grounds on which the unpaid portion of said judgment was rejected, and the payment thereof refused by the Secretary of the Treasury, are briefly set forth in the petition filed in this case, and will more fully appear from the following statement:

HISTORICAL STATEMENT OF THE ORIGIN AND NATURE OF THE CLAIMS OF 1812 AND 1813.

The treaty of 1795, between the United States and Spain, established relations of peace and amity between the two governments, which continued, without interruption on the part of Spain, until the final ratification of the treaty of 1819. From the year 1807 to the year 1812, and until the period of the declaration of war by the United States against Great Britain, in that year, the neutral rights and commerce of the United States were so far disregarded by England and France, and other European powers acting in concert with them, that Congress was compelled, in defence of those rights, to enact a series of acts known as the Embargo and Non-intercourse Laws.—(*Treaty of* 1795, *with Spain*, 8 *Stats. at Large, p.* 138; *Embargo Laws*, 2 *Stats. at Large, pp.* 451, 452, 453, 454, 473, 474, 475, 490; 499 to 502; 506 to 511; 531; 528, sect. 19; 533; 547; 700, 701; 707, 708, 719; 763; 3 *Stats. at Large, p.* 88; *Non-intercourse and Non-importation Acts*, 2 *Stats. at Large*, 379, 401, 469, 532; 528 to 533; 530, sec. 11; 550, 551; 605, 606; 651; 755; 763. *Berlin and Milan Decrees, and British Orders in Council, Ramsay's U. S. History, vol.* 3, *p.* 462 to 476, *Appendix.*)

In the year 1811, the relations between the United States and Great Britain, and between the latter power and Spain, were of such a character as to create an apprehension on the part of the United States that Great Britain would seize the provinces of East and West Florida, then a dependency of the crown of Spain; and the United States

having long looked to a cession of these provinces as an indemnification for her just claims upon Spain; and being unwilling, from their geographical position, that any other power, and especially Great Britain, should possess them, Congress, on the 15th day of January, 1811, passed a secret act and joint resolution, authorizing the President, on the conditions therein stated, to take possession of the said provinces, and for that purpose to employ the army and navy of the United States, and appropriating $100,000 for that object.—(3 *Stats. at Large, pp.* 471, 472.

Under this action of Congress, and under the orders of the President, in pursuance thereof, East Florida was invaded early in March, 1812, by the army and navy, and by certain irregular forces of the United States—the latter being mostly from the contiguous State of Georgia—and the whole inhabited portion of the country, except the city of St. Augustine, including Amelia island and the neutral port of Fernandina, was taken forcible possession of, and retained till about the middle of May, 1813.—(*Judge Bronson's Op. in case of Ferreira, p.* 6 *to* 12.)

At the period of this invasion, owing to the operation of the Embargo and Non-intercourse Laws of the United States, a vast neutral commerce was carried on at the port of Fernandina, on Amelia island, the only port on the American coast which was open to the products of all nations, and at which an exchange of commercial articles could be lawfully and safely made. The Baltic sea being closed, by the political relations then existing between the powers of Europe, vast quantities of lumber and ship timber, among other things, were exported from that place. The slave trade, which was closed in the United States in 1808, was still open in Florida, as a province of Spain. This state of things in Florida, the great facility afforded by the laws and policy of Spain for the naturalization of foreigners in that province, and the liberal grants of land made both to Spaniards and immigrants, with the attractions of a mild and salubrious climate, singularly adapted to the culture of sea island cotton and other valuable productions, led to a concentration of much of the wealth of the Carolinas and Georgia in East Florida, at and previous to this period.—(3 *Am. State Papers, by Gales & Seaton, Pub. Lands, pp.* 725 *to* 895.)

As the occupation of East Florida by the American forces was strenuously and forcibly resisted by the Spanish authorities thereof, a feeling of great bitterness and hostility on the part of the former was excited; and an occupation which was designed by Congress to be only peaceful on the part of the United States, and voluntary on the part of the authorities and subjects of the province, was converted into a forcible and violent conquest, by the American forces, of this defenceless province of a power with which we were bound to the obligations of peace, by the most solemn treaty stipulations.

For a judicial history of the wanton and indiscriminate destruction of every species of property, during the invasion and occupation of the province, as aforesaid, the following extracts are made from the decisions and reports to the Treasury Department by Judges Smith, Reid, and Bronson, who were charged with the adjudication of this class of claims:

Judge Smith says: "It has been fully proved by the testimony which in various cases has been adduced before me, that in the years 1812 and 1813 the province of East Florida was invaded by citizens of the United States, denominated patriots, principally from Georgia, and also by the regular troops belonging to the army of the United States; that these in effect co-operated; and that the whole population of East Florida, north and west of Augustine, and on the banks of the St. John's, were compelled to take part therein, or to abandon their plantations.

"It has been further proved that the cattle, horses, swine, and moveables of the plantations of this portion of the province, were, during this incursion, almost without exception, destroyed, dispersed, and lost to the owners; that the buildings, fences, and crops of many plantations were wholly destroyed, sometimes having been previously abandoned by their owners, and at others the owners having remained till the destruction commenced."

Judge Reid, after describing the previous flourishing condition of the province, says; "This revolution, which ceased in 1813, left the country desolate. Plantations, farms, houses, stock, poultry, tools, and implements—every thing in the shape of property—had been pillaged or destroyed. The country was a desert; many persons in comfortable circumstances in the beginning of 1812 were reduced to extreme poverty in the course of fourteen months, and East Florida has never recovered from the shock it then received."—(See Solicitor Clark's Rep. to the Secretary of the Treasury, dated March 7, 1851. Ap. pp. 14, 15.)

Judge Bronson, in his decision in the case of Ferreira, administrator of Pass, says: "The difficulty of obtaining supplies for such a force led them at once to look to the resources of the country; and large droves of cattle, with which the country then abounded, were immediately and unhesitatingly seized upon to relieve their necessities; and foraging parties, consisting both of regular troops and patriots, were sent out in all directions to collect cattle and other means of subsistence for the army. * * *

"A detail of some of the more revolting instances of robbery and plunder and wanton destruction on the one hand, that occurred during this period, or of individual cases of hardship, ruin, and beggary on the other, is hardly called for, and perhaps not proper in this general statement, though they might tend much to illustrate the general character of the injuries of that period. Suffice it to say, that before or when the United States troops finally evacuated the country, the whole inhabited part of the province was in a state of utter desolation and ruin. Almost every building outside of the walls of St. Augustine was burned or destroyed; farms and plantations laid waste; cattle, horses, and hogs driven off or killed, and moveable property plundered or destroyed; and in many instances slaves dispersed or abducted. So far as the destruction of property of every kind was concerned, the desolation of the Carnatic by Hyder Ali was not more terrible and complete."—(Decision, pp. 9, 10.)

Colonel Smith, of the United States army, who commanded the invading force, wrote to his government: "The inhabitants have all

abandoned their houses, and as much of their moveables as they could not carry away with them." He adds: "*The province will soon become a desert.*"—(Solicitor Clark's Rep. above cited, App. p. 15.)

President Monroe, then Secretary of State, in a letter to Governor Mitchell of 10th April, 1812, after alluding to the fact that the troops of the United States had been used to dispossess the Spanish authorities by force, says: "I forbear to dwell on the details of this transaction, because it is too painful to recite them."—(Am. State Papers, For. Aff., vol. 3, p. 571.)

For a more full history of these transactions, see the correspondence between Mr. Monroe and Mr. Foster, at pages 543, 544, and 545, of the third volume of American State Papers, Foreign Relations; also the documents communicated by the President to the House of Representatives on the 1st July, 1812, at page 571, &c., of the same volume of American State Papers, consisting of instructions to General Matthews and Colonel McKee; Mr. Monroe's letter of recall to General Matthews, and also his letter of instructions to Governor Mitchell.

These injuries, which were protested against by Spain, were in open violation of the law of nations and of the treaty of peace then existing between the two governments, and were so admitted to be by the United States; and their commissioner, General Matthews, was punished by dismission.—(Am. State Papers, above cited.)

During the war between the United States and Great Britain, in 1814, West Florida was entered by General Jackson, and the army under his command, to expel the British and their Indian allies from Pensacola; and in 1818, the same officer again entered West Florida, in pursuit of the Indians, and St. Mark's and Pensacola were taken, and subsequently restored.—(For invasion of 1814, see American State Papers, Military Affairs, vol. 1, p. 698 to 707. For invasion of West Florida, in 1818, see American State Papers, Military Affairs, same volume, from p. 697 to 702.)

Both these last named acts of General Jackson and his army were also complained of by Spain as violations of her neutrality; but were justified or sought to be excused, by the United States, on the ground of necessity; while no such ground was ever urged in justification of the invasion of East Florida, in 1812 and 1813.

TREATY, AND ACTS TO CARRY IT INTO EFFECT.

For all these alleged injuries, Spain earnestly demanded satisfaction; and when the treaty of 1819 was concluded, the following provision was inserted, and constitutes the last clause of the 9th article of that instrument, viz:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants, by the late operations of the American army in Florida."

The Spanish version of this article does not contain the word "*late,*" but reads simply, "*by the operations of the American army in the Floridas.*"—(8 *Stats. at Large, p.* 260.)

The last protocol of this clause, from which both sides of the treaty

were drawn, and which was written in the *English language*, was in the following words, corresponding with the Spanish version:

"The United States will satisfy all the just claims which the inhabitants and Spanish officers of the Floridas may have upon them, in consequence of the damages they may have sustained by the operations and proceedings of the American army, as is customary with the citizens of the United States." Opposite to which, in a parallel column, Mr. Adams wrote the word "agreed."—(*Am. State Papers, Foreign Relations, vol.* 4, *p.* 622.)

"To carry into effect" this provision of the treaty, Congress passed the act of March 3, 1823, which is as follows:

"AN ACT to carry into effect the ninth article of the treaty concluded between the United States and Spain the twenty-second day of February, one thousand eight hundred and nineteen.

"SEC. 1. That the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"SEC. 2. That in all cases in which said judge shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated. Approved, March 3, 1823."—(3 *Statutes at Large*, *p.* 768.)

Secretary Rush having decided that the losses of 1812 and 1813, in East Florida, were not embraced by the above clause of the treaty, Congress, after full deliberation, passed the explanatory act of June 26, 1834, recognizing the losses of those years to be within the treaty. That act is as follows:

"AN ACT for the relief of certain inhabitants of East Florida.

"*Be it enacted, &c.*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the 161st chapter of the acts of the 17th Congress, approved March 3, 1823, for losses occasioned in East Florida by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just: *Provided*, That no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: And

provided, also, That no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States.

"SECTION 2. *And be it further enacted,* That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain: *Provided,* That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided, also,* That the authority herein given shall be subject to the restrictions created by the provisos to the preceding section."—(6 *Statutes at Large, p.* 569.)

Under these acts the territorial judges continued to adjudicate this class of claims, until Florida was admitted into the Union as a State, and the territorial courts were superseded by the transfer of the federal jurisdiction which they had previously exercised to the district court of the United States for the northern district of Florida; when, by the 6th section of the act of February 22, 1847, this duty was transferred to the judge of the said district court, as a part of his federal jurisdiction. That section is in the following words:

"That any unfinished business or proceedings now remaining or pending before the judge of the superior court at St. Augustine, as a commissioner under and by virtue of the 'act for the relief of certain inhabitants of East Florida,' approved June 26, 1834, or under any other act granting special powers or imposing special duties upon said judge, be, and the same is hereby, transferred to the judge of the northern district of Florida, to be proceeded in and finished, or decided, in the same manner provided by law; and the said district judge shall have, exercise, and possess the same duties, and powers, and rights, which have, by virtue of the act of June 26, 1834, aforesaid, or otherwise, been possessed and exercised by the said judge of the superior court at St. Augustine, so far as may be necessary to enable the said district judge to determine and finish any matter, business, or proceedings now pending and undetermined before the judge of the superior court aforesaid, by virtue of any such special act."—(9 *Statutes at Large, p.* 130.)

A number of claimants having failed to present their claims within the time limited by the act of June 26, 1834, Congress, on the 3d day of March, 1849, authorized, upon the conditions therein stated, the presentation, *adjudication,* and payment of their claims.

The act is as follows:

"AN ACT for the relief of Peter Capella, administrator of Andrew Capella, deceased, and for the relief of John Capo, and for the relief of Elijah Petty and Hannah Petty, his wife, heirs of John Beardon, deceased.

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the judge of the district court of the United States for the northern district of Florida be, and he is hereby, authorized and directed to receive and adjudicate the claim of Peter Capella, administrator of Andrew Capella; and also the claim of John Capo; and also the claim of Elijah Petty, and Hannah, his wife, heirs of John Beardon; and also the claim of Francis P. Ferreira, administrator of Francis Pass, deceased, under the provisions of the act of Congress of the twenty-sixth day of June, eighteen hundred and thirty-four, entitled 'An act for the relief of certain inhabitants of East Florida,' and that said several claims may be settled by the treasury, as are other cases under said act: *Provided, however*, That the petition for the allowance of such claim shall be presented to said judge, by the proper parties entitled to prefer the same, within one year from the passage of this act: *And provided, also*, That said parties shall respectively allege in such petition, and prove to said judge reasonable cause for such petition not having been presented within the time prescribed and enacted by said act of June twenty-sixth, eighteen hundred and thirty-four."—(9 Statutes at Large, p. 788.)

An act similar to the last was passed for the relief of Joseph Arnow, on the 20th day of January, 1853.—(Session Acts of 1853, chap. 23.)

ACTION OF THE FLORIDA JUDGES.

Under the above provisions of the treaty and acts passed "to carry it into effect," the claims in question have been adjudicated. Each claimant presented his claim by petition, verified by oath, and alleging, as required by the rules prescribed by the court, (see Rules, by Judge Reid,) the nature and extent of his losses, and the facts necessary to show that the claim was within the provisions of the treaty. The judge examined the witnesses when personally brought before him, and, when their testimony was taken by deposition, he selected and instructed the commissioners, and propounded cross-interrogatories to the witnesses, as is shown by the record on file in this case, and the records remaining on file in the Treasury Department.

All the evidence was recorded, and a copy of it, and of the decree of the judge, when "*in favor of the claimants*," was reported to the department for payment, as required by the act of 1823.

In making up his awards or decrees, the judge allowed, as the just and proper measure of damages under the law of nations necessary to fulfil the stipulations of the treaty, the proved value of the property at the time of the injury or loss; and by way of satisfaction for the further loss of the use, fruits, or profits of the property, whilst wrongfully deprived of them, and of the just satisfaction for them which the law of nations required; and, during the period that no provision of law existed for the presentation and payment of said claims, he added five per cent. interest, by way of damages, and as an equitable measure of damages, to the original value of the property, (being the legal rate of the country,) and made a formal decree that the United States

pay the same to the claimants. The decrees thus made *in favor of the claimants* were, as before stated, reported to the Secretary of the Treasury for payment; when *against them* they were deemed *final*, and were never reported to the Secretary. The report of the Secretary of the Treasury to the Senate shows that more than half the amount of the claims presented were thus finally disposed of by the judges—thus making the decision of the judges *against* claimants final and conclusive, whatever may have been the effect of decisions *in their favor*.

EXECUTIVE AND LEGISLATIVE ACTION UPON THE DECREES OF THE FLORIDA JUDGES.

When these claims reached the treasury, they were subjected to the same scrutiny as claims which had never been adjudicated.* The Secretaries claimed the right to go fully into the merits of the claims upon the evidence reported, and called upon the judge for further evidence whenever they entertained doubt. In regard to the damages decreed for the loss of the use and fruits of the property, it was rejected, in all instances, under the mere *usage* of the Treasury Department in reference to domestic pecuniary demands, without any reference to the treaty, the law of nations, or the express direction of the act of 1823, which required the Secretary, when he paid at all, to pay the *amount* of the decree.

Secretary Woodbury's first decision, disallowing the damages decreed under the name of interest, was made on the 20th December, 1836, in the case of John Gianopoli, in which, in allowing the claim, he added the words: "with the exception of interest, which it is believed has not been allowed in claims similarly situated."—(1 Vol. Judicial Records, Treasury Department, folio 145. Letter of William L. Hodge, Acting Secretary of the Treasury, to Hon. Wm. A. Graham, dated June 9, 1851. Ex. Doc. No. 68, 2d Sess. 24th Con., H. R.; Ex. Doc. No. 98, 3d Sess. 25th Cong., H. R.)

This decision of Secretary Woodbury was made without argument on the part of the claimants, and continued to be followed by him, without reference to the Attorney General, until the expiration of his term of office.

In 1841, reference was made to Attorney General Crittenden, and to Attorney General Nelson in 1843, as to the propriety of allowing this portion of the damages. The references, as well as the opinions upon them, were made upon the mere usage of the Treasury Department as to the payment of interest upon pecuniary domestic claims, without any reference to the treaty or the law of nations, or that provision of the act of 1823, which required the Secretary, when he paid at all, to pay the amount of the judge's decree.—(Attorneys General Opinions, Vol. 3, p. 635; Ib., Vol. 4, p. 286.)

The practice of Secretary Woodbury, under the departmental usage, having been thus confirmed, has been followed, as a precedent, up to the present time

* See correspondence between the Hon. A. E. Maxwell, representative from Florida, and McClintock Young, esq., late chief clerk of the Treasury Department, under date of *17th and 21st* of February, 1855. For correspondence, see pp. 33 to 37, inclusive, of this *document*.

On the 28th February, 1849, Secretary Walker referred these questions of the measure of damages to which the claimants were entitled, and the mode in which the treaty required those damages to be established, to the Attorney General, for his opinion thereon, under the treaty and law of nations.—(See his reference of that date.)

In answer to this reference, Mr. Crittenden, who was then Attorney General, (16th April, 1851,) gave an opinion, in which he declared that the law of nations governed the question of the measure of damages to which the claimants were entitled under the treaty, (being the rule adopted by the Florida judges in conformity to that law;) but, he advised the Secretary to follow Mr. Woodbury's precedent, until further action by Congress.—(See Attorneys General Opinions, vol. 5, p. 333 to 354. Also, Mr. Crittenden's letter to Hon. T. Ewing, of March 15, 1851, in which he says:

"That in the cases in question, the *value* of the property lost, with the addition of interest, as a compensation for the deprivation of its use, is a measure of the pecuniary satisfaction to which the injured owner is entitled, in accordance with the laws and usages of nations."—(Printed papers in "Reddin Blunt's case," p. 35. See, also, letter of Mr. Nelson to Hon. Wm. Cost Johnson, dated the 6th day of March, 1850; also, opinions of Hon. Messrs. Ewing, Forward, and Spencer, who made the references to the Attorneys General under the usage of the department; also, Judge Bibb's letter to Hon. Wm. Cost Johnson, of June 28, 1851—all concurring in the opinion that the cases were governed by the law of nations, and not by the usage of the Treasury Department, and that the measure of damages awarded by the Florida judges was correct; also, Secretary Meredith's reference to the Attorney General, under the treaty and law of nations, dated 17th June, 1850; also, Secretary Corwin's official statement, of 23d September, 1851, that the law of nations had never been applied by the Secretaries of the Treasury to this class of claims; also, letters of Spanish minister to Secretary of State, of date the 3d December, 1849, and of 12th October, 1850—all on file in the Treasury Department, and sent to the Senate by Secretary of the Treasury.)

On the 4th day of February, 1851, Mr. Secretary Corwin referred all the questions involved in these cases to the Solicitor of the Treasury for a report thereon.—(Reddin Blunt's case, pp. 7 and 8.)

On the 7th day of March, 1851, Mr. Solicitor Clark made an elaborate report, affirming the obligation of the United States to pay the full amount of the decrees of the Florida judges; and also affirming the correctness of the measure of damages decreed by the said judges.—(See official report.)

As the treaty required the claims to be established judicially—after the second opinion of Attorney General Crittenden, and the report of Solicitor Clark—all the questions involved in these cases were referred, by the Treasury Department, back to the judge of the district court of the United State for the northern district of Florida, on whom jurisdiction to adjudicate these claims had been conferred by the act of 1847, above recited, with all the opinions of the Attorneys General on the subject, for a full judicial review of those questions; and the district attorney of the United States for that district, was directed to

represent the United States, and argue the said questions before the judge.

This review took place in the case of Francis P. Ferreira, administrator of Francis Pass, deceased, in which, after full discussion, the finality of the decrees of the judges, and the correctness of the measure of damages decreed by them, were fully sustained by Judge Bronson.—(See printed opinion of Judge Bronson, in the Supreme Court record of that case, p. 30 to 62.)

From this decision an appeal was prayed in behalf of the United States to the Supreme Court, which was dismissed for want of jurisdiction.—(13 Howard, p. 40.)

On the 4th of November, 1853, the same questions were referred by Mr. Secretary Guthrie to Mr. Attorney General Cushing for his opinion thereon.—(See reference in Judge Bibb's printed report to the Attorney General, of March, 1854, pp. 1 and 2.)

Mr. Cushing declined to give an opinion upon the merits of the questions referred; expressed a full concurrence in Mr. Crittenden's opinion of the 16th April, 1851—which sustained the correctness of the measure of damages adopted by the Florida judges; but, like Mr. Crittenden, he set up Mr. Woodbury's precedent, and that of his successors, founded upon it—admitted to have been in violation of the treaty and law of nations, against payment; and advised the Secretary, without any application on behalf of the claimants, and against their wishes, to report the entire class of claims to Congress, for its action thereon.

In pursuance to this advice, the said Secretary sent his report to the Senate, dated the 22d July, 1854, accompanied by Mr. Cushing's opinion, notwithstanding that body had, by a report of its Judiciary Committee, dated the 24th February, 1851, and unanimously concurred in by the Senate, declared, in the case of the legal representative of John Forbes, one of the claimants, that the "acts intended to carry into effect the provisions of the treaty are adequate to furnish relief co-extensive with the obligations thereof, and that no additional legislation is necessary."—(Sen. Doc. No. 82, 1st sess. 33d Congress, for the report of Mr. Guthrie; Sen. Doc. No. —, for that of the Judiciary Committee of the Senate.)

This report of Mr. Secretary Guthrie, with the memorial of Robert Harrison, one of the claimants, was referred to the Judiciary Committee, both in the Senate and House of Representatives. A strong report, affirming the right of the claimants under the treaty, to the payment of the full amount of the decrees of the judges, and in favor of the legality and justice of the measure of damages decreed by them, was made by the Judiciary Committee of the House, accompanied by a joint resolution, requiring the Secretary of the Treasury to pay the said decrees in full out of the general appropriation made by the acts of 1823 and 1834, passed to carry the treaty into effect. This resolution was laid on the table through the misapprehension and consequent *opposition* of a single member, by a vote of 89 to 104, after having been taken up, out of its order, by a vote of 118 to 54.—(Report No. 33, H. R., 2d sess. 33d Cong.; House Journal, same session, p. 368 to 378.)

No report was made by the Judiciary Committee of the Senate; but the joint resolution, reported in the House of Representatives, was offered in that body as an amendment to the civil and diplomatic appropriation bill near the close of the session, and, after it had been laid on the table in the House of Representatives, and was rejected—the two senators who opposed the amendment, urging the propriety of referring it to the Court of Claims for a judicial decision upon the legal questions involved in this class of cases.

LEGAL PROPOSITIONS, POINTS, AND AUTHORITIES.

It will be contended in behalf of the petitioner—

I. That the treaty required the claims, provided for by the 9th article thereof, to be established judicially, and according to its just obligations under the law of nations; and bound the United States to pay the damages which should be so established.

II. That the acts above recited were intended to carry the said article of the treaty into full and complete effect, by providing for the adjudication and establishment of the said claims, by the judges in Florida; and for the payment of the amount of the decrees of the said judges, by the Secretary of the Treasury, when within the provisions of the treaty, and, consequently, within the jurisdiction of the said judges.

III. That the claim of the petitioner's intestate, with others, has been judicially established by the judges in Florida, as the treaty required, and as the acts provided—as shown by the record on file in this case.

IV. That by the payment of the original value of the property, as decreed by the judges in Florida, by the Secretary of the Treasury, in the case of the petitioner's intestate, and others, it has been decided, in the mode prescribed by law, that the said claims, including that of the petitioner's intestate, are just and equitable, within the provisions of the said treaty; and the petitioner is, therefore, entitled to the payment of the residue of the decree made in favor of her intestate's estate, as shown by the record on file in this case.

V. That the measure of damages decreed by the Florida judges, is the just and legal one to which the petitioner's intestate is entitled, under the provisions of the treaty, the law of nations, and the acts of Congress passed to carry the treaty into effect; and that the petitioner is, therefore, entitled to the payment of the residue of the decree made in favor of her intestate's estate, as shown by the record on file in this case.

The foregoing propositions will be sustained by the following points, and authorities:

1. The treaty between the United States and Spain of the 22d Feb-

ruary, 1819, and the law of nations, are the source of all right to the claimant.

Const. U. S., art. 6, sec. 2; Rutherforth, book 1, ch. 1. sec. 13; 1 Blk. Com., p. 43; 4 ib pp. 66, 67; Wheaton on International Law, chap. 1, p. 46, et ult, pp. 308, 309, 334, sec. 17. 1 Kent's Com., 5th edition, pp. 68, 69, 70, 173, 174, 175. Grotius, book 2, chap. 16. Vattel, book 2, chap 17. Rutherforth's Inst., book 2, chap. 7. 9 Cranch, p. 191. 2 Cranch, p. 64. 9 Cranch, p. 244, where the Supreme Court say, "The court of prize is emphatically a court of the law of nations, and it takes neither its character nor its rules from the mere municipal regulations of any country." 2 Dallas, p. 1, "That the municipal laws of one country cannot change the law of nations so as to bind the subjects of another nation." Vattel, book 2, chap. 12, sec. 162, "That the law of nature alone regulates the treaties of nations." Opinion of Attorney General Wirt, old opinions, p. 635. Opinion of Attorney General Crittenden in Reddin Blunt's case, Attorneys General Opinions, by Farnham, vol. 5, p. 333, that "the compacts of nations can be governed only by the law of nations;" and that to apply "local law or local usage" would be a "violation of the most indisputable principles of the public law." Senate doc. No. 82, 1 sess., 33 Cong., p. 13, for Attorney General Cushing's concurrence in the Opinion of Attorney General Crittenden; Lieber on Construction, Am. Jurist, vol. 18, pp. 91, 92, &c.

2. That the satisfaction which the treaty stipulates is to be decided and measured by the law of nations, and not by the usage of the Treasury Department.—(*See authorities under first point.*)

3. That the losses occasioned by the invasion of East Florida, in 1812 and 1813, are within the provisions of the treaty, and are recognized to be so by Congress:

See Am. State Papers, For. Rel., Vol. 4. No. 311, particularly pp. 465–'6, being Mr. Onis' letter of January 24, 1818, to the Secretary of State; also p. 467, ditto to ditto, of February 10, 1818; Ibid, p. 475, being a reply of the Secretary of State to the foregoing letters, under date of March 12, 1818; p. 485–'6, being a reply of Mr. Onis to the last named letter of the Secretary of State; report of Mr. Everett from Committee on Foreign Relations, Ho. Rep., No. 99, 2 sess., 20 Congress; Mr. Archer's report from Committee on Foreign Relations, Ho. Rep., No. —, — sess., — Congress, made March 26, 1834; act of March 26, 1834; Senate rep. 222, 2 sess. 29 Cong., report of Judiciary Committee; Senate rep. 165, 1 sess, 30 Cong., report of Mr. Webster, from Committee on Foreign Relations; report of Mr. Downs, from Judiciary Committee of the Senate of February 24, 1851, in the case of John Forbes; Ho. Rep. No. 33, 2 sess. 33 Cong., report Judiciary Committee in case of Robert Harrison and others; Secretary Woodbury's report, Ex. Doc., No. 98, 3 sess. 25 Cong.; Opinions of Attorneys General, before referred to; opinion of Mr. Legare, Att'ys Gen'l Opinions, vol. 3, p. 677—721; Mr. Crittenden's brief in Supreme Court, in case of Ferreira, p. 1; opinion of Supreme Court

in same case, 13 Howard, 40; opinion Attorney General Cushing of June 9, 1854, that—

"The act of 1834 was particularly intended to declare and to define the import of the word 'late.'"—Senate Doc. No. 82, 1 sess. 33 Cong.

4. The treaty requires the amount of the damages, or satisfaction, to be established judicially.

That the words, "by process of law," in the above clause of the treaty, being technical words borrowed from common law, must be referred to that code for their true meaning, see Campbell's Grotius, vol. 2, chap. 16, "On the interpretation of treaties," sec. 3; Vattel, book 2, chap. 17, sec. 276; Puffendorff, book 5, chap. 12, sec. 4; Wheaton's International Law, p. 334, sec. 17; 1 Kent's Com., pp. 163, 174; 3 Washington's C. C. Rep. p. 215; Dwarris on Construction of Statutes, p. 702; also Vattel, book 2, chap. 17, sec. 267—282, 283; 6 Peters, 743, U. S. *vs.* Arrendondo *et al.*; also 691 same case; 2 Att'y. Genl's. Op., p. 198.

For the meaning of these words in the common law, and in our Federal and State Constitutions, see 2 Kent's Com., 6th edition, p. 13, note b; Judge Tucker's Com. on Const. U. S., Tucker's Black. vol. 1, part 1, appendix 203; Exparte John and Cherry streets, 19 Wendell's rep. p. 676, in the Supreme Court of New York; Taylor *vs.* Porter, 4 Hill, p. 146, in same court; Coke's Inst., p. 50; Magna Charta, ch. 29; Story's Com. 2 vol., sec. 1789; Hoke *vs.* Henderson, 4 Devereux, p. 15; Judge Bronson's opinion in case of Ferreira; adm., &c., p. 24 to 31; 5 Amend. Con. U. S.; opinion of Solicitor Clark, before cited; 6 of the Kentucky resolutions of 1798, (drawn by Mr. Jefferson); 4 Elliott's debates 541; Mr. Madison's report on the Virginia resolutions, Ib. pp. 553, 554, 560.

5. The "satisfaction" stipulated by the treaty, means the full measure of damages which the law of nations recognizes and prescribes as a just indemnity for injury to property.

See Wheaton on International Law, pp. 340, 341, 342, 567; 1 Kent's Com. 5th ed., p. 61; Vattel, book 2, chap. 18, sec. 324; ibid, book 3, chap. 11, sec. 185; Campbell's Grotius, book 2, chap. 17, p. 192; Rutherforth, book 1, chap. 17.

6. The measure of damages adopted by the Florida judges, in this and other cases of the class, to wit, the proved value of the property at the time of its loss or destruction, with interest, at the legal rate of the country, as a satisfaction for the further damage occasioned by the loss of the annual use and fruits of such property, or of its value, is the most mitigated measure, recognized by the law of nations, as a satisfaction for such injuries.

First. To show that the deprivation of the use and fruits of the property unlawfully taken or destroyed, forms as essential a part of the "injury" for which the treaty stipulates "satisfaction" as the loss of the property itself; and that the rule of damages adopted by the Florida judges is uniformly sanctioned by writers on the law of nations.—See Rutherforth's Institutes, book 1, chap. 17, secs. 5 and 8; Campbell's Grotius, vol. 2, chap. 17, sections 4 and 5; Vattel

book 2, chap. 18, sec. 342; Wheaton's International Law, part 4, chap, 1, sec. 3; Wheaton's Life of William Pinkney, pp. 261, 262; Puffendorff, book 3, chap. 1, sec. 9, p. 312.

Second. That it is uniformly sanctioned and insisted upon by the United States, in the construction of its treaties, and in its diplomatic intercourse with other nations: See opinion of Attorney General Wirt, in the cases arising under the Convention with Great Britain to carry into effect the award of the Emperor of Russia; Farnham's edition, vol. 2, p. 28 to 34; Letter of Mr. Clay, Secretary of State, to Mr. Vaughan, British Minister, dated 15th April, 1826, certified by State Department; Opinions of Langden Chevcs, American Commissioner, as cited by Judge Bronson, in the case of Ferreira, p. 18, of the Opinion; also, his estimate of interest for the Secretary of State, of 26th April, 1825, certified by State Department; Wheaton's Life of William Pinkney, pp. 196, 198, 265, (note) 371; Am. State Papers, Foreign Relations, vol. 2, pp. 119, 120, 387, 388, 283; Ex. Doc. No. 32, 1st sess. 25th Cong., Ho. Reps., p. 249; Ex. Doc. Ho. Reps., 2d sess. 27th Cong., vol. 5, No. 291, p. 50; Am. State Papers, Foreign Relations, vol. 4, p. 639; Elliott's Diplomatic Code, vol. 2, pp. 605, 625; 8 Stats. at Large, pp. 119, 150, 249, 526. For cases of the "Encomium" and "Comet," see Senate Doc. No. 174, 3d sess. 24th Cong.; Senate Doc. No. 216, 3d sess. 25th Cong.; Senate Doc. No. 119, 1st sess. 26th Cong.; President's Message, 26th August, 1842, with the Report of the Commissioners, Hon. Wm. L. Marcy, Judge Rowen, and afterwards Judge Breckenridge; Ex. Doc. No. 291, Ho. Reps. 2d sess. 27th Cong., vol. 5, p. 30, and tabular statements, from p. 50 to 61, in relation to the treaty with Mexico of 11th April, 1839; see report and decisions of the Board of Commissioners for the adjustment of claims under the treaty with Mexico of 2d February, 1848, on file in the State Department, and the tabular statement from that department, dated July 11, 1851, certified by James S. Mackee, then keeper of the archives thereof, containing the amount of interest on the several awards made by the said commissioners, according to the rule adopted by the judges in Florida; opinion of Attorney General Grundy, Old Opinions, pp. 1225, 1226.

Third. That the same rule has been sanctioned by the Supreme and other courts of the United States in deciding cases arising under the law of nations.—(See The Amiable Nancy, 3 Wheat., pp. 546, 560; Anna Maria, 2 Wheaton, pp. 327, 335; The Appoleon, 9 Wheaton, pp. 362, 377; 1 Gallison, p. 315, The Lively; The Charming Betsey, 2 Cranch, p. 125; Maley *vs.* Shattuck, 3 Cranch, pp. 474, 491, 492; Del. Col. *vs.* Arnold, 3 Dallas, pp. 333–'34.)

The admiralty courts of Great Britain concur in this rule.—(See the case of the Acteon, 2 Dodson, p. 84; The Lucy, 3 Robinson, p. 208; The Driver, 5 Robinson, p. 145.)

That the rule is the same in the French Council of Prizes.—(See the case of the Pigou, 2 Cranch, p. 98 to 101, reported in note to the Charming Betsey.)

That courts exercising admiralty jurisdiction, including the courts of the United States, are governed by the laws and usages of nations.—

(See 1 Kent's Com., pp. 18, 19, 68, 69, 70; Wheaton's International Law, p. 47; 9 Cranch, 244; Ib., 191.)

In concluding our citations of these leading authorities we add the language of Chancellor Kent: "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of established writers on international law."—(Kent's Com., pp. 18, 19.)

7. The rule of damages adopted by the Florida judges is the just and legal one in cases governed by the common or civil law, as well as in cases governed by the law of nations.

That the rule is the same in actions of *tort* for injuries to property, both in the United States and in England, and both in the federal and State courts.—(See Conrad vs. Pacific Insurance Co., 1 Baldwin, C. C. Rep., p. 138; S. C., 6 Peters, pp. 273, 282; Sedgewick on the Measure of Damages, pp. 549, 550, 551, 517, that "interest seems to be usually given by way of damages for the detention of property;" ib., pp. 214, 498, 499, 519, 520, 548, 570, 586, 587; chap. 19, generally; Greenleaf on Evidence, vol. 2, pp. 591, 612, 282, sec. 276; Church vs. Cherryfield, 33 Maine Rep., p. 457; Soule vs. White, 14 Maine Rep., p. 436; Hammett vs. Russ, 4 Shepl., p. 171; Kennedy vs. Whitwell, 4 Pick., p. 466; Greenfield vs. Leavitt, 17 Pick., p. 3; Barry vs. Bennett, 7 Metcalf, pp. 354, 363; Boyden vs. Moore, 11 Pick, p. 363; Swift vs. Barnes, 16 Pick., p. 194; Boyd vs. Brown, 17 Pick., p. 453; 21 Pick., p. 559; 1 Metcalf, p. 172; 14 Pick., pp. 356, 361; 15 Pick., pp. 198, 206, 207, 297, 300; White vs. Webb, 15 Connect. Rep., p. 365; 19 do., 319; Wilson & Gibbs vs. Conine, 2 Johns. Rep., 282; 14 Johns. Rep., 273; ib., vol. 15, pp. 198, 206; Bissell vs. Hopkins, 4 Cowan, p. 52; 2 Hill, p. 132; Hyde vs. Stone, 7 Wend., pp. 354–'5; Dillenback vs. Jerome, 7 Cowan, pp. 294, 300; Beals vs. Guerney, 8 Johns. Rep. 446; Baker vs. Wheeler, 8 Wend., 505; Hebburn vs. Sewall, 5 Harris & John., 212.

Pope vs. Campbell, Hard. p. 31; Meed vs. Phillips, Littell's Select Cases, p. 50; Outton vs. Barnes, ib. 136; 7 Monroe, 209; 3 Bibb, p. 92; 3 Littell, p. 25; 4 Dana, p. 162, Glasscock vs. Hays; Banks vs. Hatton, 1 Nott & McCord, p. 222; Talbird vs. Baynard, 2 Hill, S. Car. Rep. 599; St. John vs. O'Connell, 7 Porter, (Ala.,) Rep. p. 481; Eakins vs. The East India Company, 1 Pr. Wm's, p. 395; 2 Brown's Parl. Cases, p. 72. S. C.; 2 Eq. Cases Abr., ch. 1, p. 534; 11 Campbell, p. 477, per Lord Ellenborough.

That the rule is the same under the civil law, and that "fruits or profits were awarded in cases of wrongful taking or detention of property," as part of the damages by Justinian, liber 22; liber 17; Cod. liber 3, c. De Condit, ex. leg.; Domat, book 3, title 5, sections 1 and 2, vol. 1, p. 406, sec. 13, pp. 407, 408, sec. 18.

8. It was the declared intention of Congress, by the above recited acts, to carry the 9th article of the treaty into full and complete effect. (See acts passed to carry the treaty into effect; Opinion of Attorney

General Nelson, 4 vol. Attorneys General Opinions, by Farnham, pp. 286 to 294.)

9. The acts are all to be construed together as one act, *in pari materia*, and in subordination to the provisions of the treaty.

Dwarris on the Construction of Statutes, p. 699; Attorney General Wirt's Opinion under the Convention of St. Petersburg, old edition, 568 to 571; Lieber on Construction, 18 Am. Jurist, p. 67 to 92; 2 Story on Construction, sec. 1838, pp. 570, 571, 572; Ordinance of 1781, 5 Wheaton, App., p. 126.

For general rules of construction, see Dwarris, pp. 663, 690, 691, 692, 698, 702, 703, 718, 704, 713, 755, 756, 757, 760, 759, 762, 753, 660, 765, 768, 769, 730; Pothier on Obl., part I, ch. 1, sec. 1, art. 7, rule 2.

Bend vs. Hoyt, 13 Peters, p 263 to 273; Talbot vs. Seaman, 1 Cranch, p. 43; The Charming Betsey, 2 Cranch, p. 118; Fisher vs. Blight, 2 Cranch, p. 390; Pennington vs. Cox, 2 Cranch, p. 33; Lincoln College case, 3 Coke, 59, b.; Co. Litt., 381, a; 4 Bac. Abr. Statute (1,) plea 7, 645; Stowell vs. Zouch, Plowden, 365.

10. The acts of Congress required the Florida judges to act in the judicial character previously conferred upon them by their appointment as judges, and in that capacity to establish the claims as the treaty required.

See Treaty and Acts heretofore cited; also Act of 30th March, 1822, establishing territorial government in Florida, Stats. at Large, vol. 3, p. 656; Act of 24th September, 1789, and 2d March, 1793, 1 Stats. at Large, pp. 73, 333; Story on Const., vol. 2, sec. 1777, authorities there cited, p. 526; Ib., sec. 1627, p. 411; Constitution United States, art. 2, sec. 2; 4 Black. Com., pp. 265, 269; 9 Howard, 245; Benner vs. Porter; Treaty of 1819, 11th art; 3 Stats. at Large, p. 710; Am. Insurance Company vs. Conter, 1 Peters, p. 546, and authorities ante and post; Opinion of Attorney General Gilpin, (old,) 1361, 1362; Civil Code of Louisiana, art. 3522, note 20, p. 355; 2 Story's Com., sec. 1627, p. 411; Ib., sec. 1729, p. 487; United States vs. Nourse, 6 Peters, 470; United States vs. Vorhees, 10 Peters, p. 449 to 478; United States vs. Cox, 11 Peters, 162; United States vs. Randolph, 2 Brock., 447.

11. The duties to be performed by the judges in establishing these claims as the Treaty and Acts required, was of a strictly judicial character, and the jurisdiction of the courts, of which they were the respective judges, extended to "all cases arising under the Constitution and laws of the United States," which embraced this class of claims.

(Acts establishing said court and authorities as cited.)

12. A proceeding by petition, as prescribed by Congress and adopted by the Florida judges in adjudicating these claims, was a proper judicial process to fulfil the treaty.—(See 6th section of the act of 23d May, 1828, 4 Statutes at Large, p. 285, by which the land claims in Florida were to be brought before the courts for adjudication by peti-

tion; also, acts for the adjudication of the land claims in Missouri, Arkansas, Louisiana, &c.; 2 Story's Com. on Constit., sec. 1725, p. 485; Osborn vs. The Bank of the U. S., 5 Wheaton, 747; Weston et al. vs. City Council of Charleston, 2 Peters, 464; Rhode Island vs. The State of Massachusetts, 12 Peters, 750, 751; 4 Statutes at Large, p. 165, sec. 4; 1 ib., p. 83, sec. 17; Dwarris, general rules for construing statutes, 7, 8, 10, pp. 662, 663; 3 Black. Com., ch. 17, pp. 256–'57, petition of right, *monstrans de troit;* Staunf. P. C., ch. 15; Skinner, pp. 608, 609; Rastell Entr , p. 461; 4 Rep., p. 55; Tidd's Practice, p. —; act of 3d March, 1849, for the relief of Peter Capella and others, 9 Statutes at Large, p. 788.)

13. Congress cannot be presumed to have legislated for the purpose of defeating the treaty, when there has been a declared purpose to carry it into effect, and a series of acts passed for that purpose Nothing can be implied against such a series of acts of that character. (The Emily and Caroline, 9 Wheaton, 388; Vattel, book 2, chap. 17, sec. 282.)

14. The treaty binds the United States to pay the amount of the damages, so established, on cases within the provisions of the treaty. 9th article of the treaty of 1819; Opinion of Attorney General Legare; of Dec. 7, 1841, Attorneys general Op., (by Farnham,) vol. 3, p. 721; Report of Mr. Dean, from the Committee on Territories, in the Ho. Reps. in 1842; Act of 3d March, 1823, requiring the Secretary to pay the amounts of the judges' decisions, when within the treaty.

Opinion of Attorney General Legare, of 4th August, 1842, in the case of William Otis, Op. Att's General, vol. 2, p. 1520; Co. Litt., 212, b; Pinnell's case, 5 Coke, 117.

The judgment of a court of competent or peculiar jurisdiction cannot be questioned collatterally, but only by an appellate judicial tribunal.—(Gelston et. al. *vs.* Hoyt, 3 Wheaton, 246, and authorities genally.)

15. It was the evident intention of Congress, by the acts passed to carry the treaty into effect, to authorize and require the Secretary of the Treasury to pay whatever the judges might lawfully decree under the said treaty.—(First and second sections act of 3d March, 1823.)

16. The acts of Congress required the Secretary of the Treasury to act in his ordinary executive character, as such Secretary, and in the capacity in which he had been previously appointed.—(See acts, and 2d sec. 2d art. Constitution, and authorities ante and post.)

17. The only power of the Secretary, over the decisions reported to him by the judge, was to ascertain, from the evidence, whether the claims were within the provisions of the treaty; and if he found them to be so, to pay "the amount thereof;" and if not to reject the same for that reason.—(Acts of 3d March, 1823, and 26th June, 1834, and authorities cited to show that the acts must be construed in subordination to the treaty; Constitution U. S., art. 2, sec. 2; 2 Story on Const., sec. 1777, p. 576, and authorities there cited.)

18. The three great powers of the government—the legislative, executive and judicial—are separate, distinct, and independent of each other.—(Constitution U. S. art. 1, sec. 1; art. 2, sec. 1; art. 3, sec. 1.)

The superior courts of the Territory of Florida were, and the district courts of the United States in that State are, judicial tribunals, and as such, belong to systems derived from the Constitution of the United States; and the Secretary of the Treasury could not exercise joint jurisdiction with them, nor appellate jurisdiction over their decisions.

Constitutional courts belong to the judicial system of the United States, within the 3d article of the Constitution. Legislative courts are derived from the general powers of Congress over Territories; they are, therefore, derived from the Constitution, and are invested with all the qualifications which separate the judiciary powers from the other great powers of the government.

The jurisdiction of legislative courts "is conferred by Congress in the exercise of their general powers which that body possessess over the Territories of the United States." They are competent to receive and exercise whatever powers Congress may confer for redressing civil injuries, or restraining and punishing public wrongs; and could, therefore, exercise all the powers conferred by the acts of Congress to carry the treaty into effect.—(Am. Insurance Company, *vs.* Canter, 1 Peters, p. 546; Martin *vs.* Hunter, 1 Wheaton, p. 327 to 330; 4 art. 3 sec. Constitution U. S.; 1 art. 9th sec. Constitution U. S.; 2 art. 2 sec. Constitution U. S.; act of 1789, establishing judicial system U. S., 1 Stats. at Large, p. 73; act of 1789, establishing Treasury Department, 1 Stats. at Large, p. 65; stat. 16 Charles I., ch. 10; 1 Black. Com., p. 266 to 269; 4 Inst., p. 71; 3 Story's Com., p. 355; 9th art. treaty of 1819, last clause; acts to carry treaty into effect; opinions of the judges under the pension act of 1792, as cited; Marbury *vs.* Madison, 1 Cranch, 137.)

19. Congress could not, constitutionally, confer judicial power upon the Secretary of the Treasury, as Secretary; nor could they clothe with power, as an executive officer, to revise judicial decisions.—(Authorities cited.)

20. The acts of Congress, therefore, authorized and required the exercise of all the judicial power necessary to establish the said claims, agreeably to the provision of the said treaty, by the Florida judges; and conferred no judicial power, appellate or otherwise, upon the Secretary of the Treasury.

21. Neither the stipulations of the treaty nor the acts of Congress passed to carry it into effect, will warrant the injustice of making the decisions of the judges, when against claimants, final, and of no validity when in their favorr.—(See acts, that decisions against the claimants are not to be reported to the Secretary of the Treasury.)

22. The Secretary, by paying the original value of the property, as decreed by the judges, has decided the claims to be "just and equit-

able within the provisions of the treaty," and thus foreclosed that question (That the right to the interest decreed by the judges, by way of damages, for the loss of the use and fruits of the property, is a pure question of law under the treaty, to be decided by the laws and usages of nations, see the authorities cited.)

23. If the Secretary of the Treasury had authority to revise the decision of the Florida judge, made in accordance with the treaty, the acts to carry it into effect, and the law of nations; yet, as he did not allow and pay the full measure of damages so decreed in favor of the claimant, this court is bound to decree, according to the said treaty, acts, and law of nations, that the said claimant is entitled to the payment of the residue of said decree.—(See act of 24 February, 1855, organizing the Court of Claims, and authorities before cited; 2 Story, on Const.; sec. 1675, 1676, 1677, 1678, 1679. Ib. sec. 1574, p. 365, note 3.)

24. The Secretary of the Treasury, by applying the usage of the Treasury Department to these treaty cases, and by rejecting, under that usage, an essential part of the satisfaction stipulated by the treaty, and established by process of law, violated both the treaty and the express direction of the acts under which he proceeded—which acts directed him to the provisions of the treaty for his guide, and not to the usage of the Treasury Department.—(See authorities under 1st and 2d points, also treaty and acts. Lieber on Precedents, 18 vol. American Jurist, 286 to 293; 10 Peters, 95; Ib. 153; Hob. 270; 4 Coke, 94; Bouvier's Law Dict., Title Precedent, p. 349; Title Reason, p. 408; Ib. p. 525, Title Stare Decisis; 1 Kent, 476.)

25. The usage which the Secretary applied was not applicable to this class of claims—(damages for injury to property)—if they had been domestic claims, and governed by the municipal laws and usages of the United States, instead of being international claims, governed by the law of nations.

There is no rule of the Treasury Department against the payment of interest, by way of damages, as a measure of satisfaction for injuries to property, under acts of Congress containing no express provision for its payment

It was paid under the act of 2d July, 1836, for the relief of Mrs. O'Sullivan, upon an opinion of Attorney General Butler, under a direction in the act to pay the "actual loss."—(6 Stats. at Large, p. 697; printed Opinions of Attorneys General, old edition, p. 1115.)

It was paid in Sibald's case, under the act of 23d August, 1842, by the direction of Attorney General Nelson, under a direction in the act to ascertain "the *actual damages* which Charles F. Sibald has sustained and would be entitled to recover upon the principles of law, as applicable to *similar cases*, by reason of the interference of any agent or agents of the United States, acting under their authority, with the use, possession, or enjoyment of his lands, timber, mills, or other property in East Florida."—(6 Stats. at Large, p. 864; Ex. Doc. No.

68, 2d session, 32d Congress, p. 27; Attorneys General Opinions, p. —; same House Doc. No. 68, p. 27.)

It was paid to George Fisher's legal representative, under the act of 12th April, 1848, under a direction of said law, requiring the Auditor to adjust his claims for property taken or destroyed by the troops of the United States in 1813, "on principles of justice and equity, and so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops."—(6 Stats. at Large, p. 712; Attorneys General Opinions, vol. 2, p. 2139.)

For the rule of the department, see opinion of Attorney General Taney of 10th September, 1831.—(Op. Att'ys Gen., vol. 1, p. 785.)

For numerous instances where Congress has provided expressly for the payment of interest in cases of tort, see Am. State Papers, vols. 1 and 2, Miscellaneous.

That in all other cases where the same measure of damages has been awarded under treaties, as a satisfaction for injury to property, it has been paid at the Treasury Department.—(See authorities cited under 6th point.)

That the usage of the Treasury Department in the Florida cases, being in violation of the usage in other treaty cases, and in violation of the treaty and law of nations, is nugatory.—(See Money *et al. vs.* Leach, 3 Burr, 1747; United States *vs.* Buchanan, 8 Howard, 102; Cowan, vol. 2, pp. 707, 748; 16 John, p. 374; Leigh's (Va.) R. 632.)

26. If it were conceded that the injuries of 1812 and 1813 were not embraced by the treaty, and were not recognized to be within it by Congress, still, as they have been recognized by Congress to be international injuries, committed in violation of the law of nations and the then subsisting treaty with Spain, for which the United States are bound to make indemnity; and as Congress has directed them to be adjudicated and paid, under the act of 1823, precisely like the injuries of 1818, the law of nations would govern the measure of damages.—(See authorities cited.)

27. The opinion of Mr. Chief Justice Taney, in the case of the United States, appellant, *vs.* Ferreira, adm'r. of Pass, (13 Howard, p. 40,) is not authority: because—

1. The decision of the court was, that it had no jurisdiction; and the opinion does not go to the point presented for decision, and to the conclusion of the judgment.—(See Cohens *vs.* Virginia, 6 Wheaton, pp. 399, 400; Vaughan, p. 382; Yale Todd, Supreme Court U. S., 17th February, 1794; Const U. S., 2 art., 2 sec.; Wiscart *et al.*, pl's in error, *vs.* Dauchey, def. in error, 3 Dallas, pp. 321 to 327, and so on; United States *vs.* Benjamin More, 3 Cranch, 159, and so on; United States *vs.* Goodwin, 7 Cranch, pp. 110, 111; The Mary, 9 Cranch, 144; Ram. on Legal Judgment, pp. 36, 37, 48, 49, 50, 116, 121, 122.)

Elliot *vs.* Pearsol, 1 Peters, 340, 341; Thompson *vs.* Tolmie, 2 Peters, 163; Wilcox *vs.* Jackson, 13 Peters, 511; Rose *vs.* Himely, 4 Cranch, 269; Lessee of Hickey *vs.* Stewart, 3 Howard, 762, 763,

that the decisions of tribunals having no jurisdiction are simply void; they confer no right, and conclude no right.

2. A power given by the Constitution to Congress cannot be so construed as to authorize the destruction of other powers given in the same instrument; and therefore no act of Congress can be construed to have been so intended.—(3 Story's Com. Const., pp. 355, 356.)

3. An act of Congress cannot be so construed as to confer supervisory powers upon a Secretary of the Treasury over the proceedings of a judicial tribunal. It would be the destruction of the power given by the Constitution to Congress, to vest the judicial tribunals with all the judicial power. It would overthrow fundamental principles; and therefore the acts of Congress must be so construed as not to admit of such absurd consequences.—(Martin *vs.* Hunter, 1 Wheaton, pp. 327, 328 to 330, and so on; United States *vs.* Fisher, 2 Cranch, 358; Dwarris on Stats., p. 755; Paine's C. C. Rep., p. 11.)

4. The Supreme Court, by its own decision, had *no jurisdiction* in said case; and its decision is only authority to show that it had no jurisdiction. The Supreme Court itself declared that "the *only* question now before us is, whether *we have any jurisdiction*," (p. 46;) the legal authority of the case, therefore, only goes to that single point.—(Cohens *vs.* The State of Virginia, 6 Wheat., p. 377; Bole *vs.* Horton, Vaughan, p. 382.)

5. The opinion of the Supreme Court, in the case of Ferreira, was founded upon a supposed decision in Hayburn's case, (2 Dallas, 409;) whereas *no decision was ever made in that case.*

6. The opinion was founded on certain *extra-judicial* opinions set forth in a note to Hayburn's case, which were not judicial authority, and which were overruled by the decision of the Supreme Court of the United States in the case of Yale Todd, which case was unknown to the Supreme Court when the decision in the case of Ferreira was pronounced.—(See note to the decision in the case of Ferreira, 13 Howard, pp. 52, 53; Ram. on Legal Judgment, p. 183; 2 Brod. & B., 593, 594; 7 Price, 503.)

7. The opinion was founded on the unconstitutional assumption that Congress could, by law, appoint commissioners to decide claims to indemnity under a treaty, without a nomination by the President or a confirmation by the Senate.—(Const. U. S. art. 2, sec. 2.)

8. The opinion was founded on the illegal assumption that judges of the United States could act as commissioners; which was overruled by the unanimous decision of the Supreme Court of the United States in the said case of Yale Todd.—(2 Story Com. Const. sec. 1777, and authorities there cited.)

9. The opinion was made upon the assumption that the act of 1823 did not make "the provisions of the treaty" obligatory upon the Florida judges, in the adjustment and decision of the claims arising under the 9th article of the treaty.—(See act March 3, 1823.)

10. The opinion was founded upon the erroneous assumption that the acts passed to carry the 9th article of the treaty of 1819 into effect required the claims, or injuries, for which the treaty stipulated satisfaction, to be adjudicated and established by the Secretary of the Treasury, and not by the judges.

11. The opinion was made upon the illegal assumption that "the authority conferred on the respective judges was nothing more than that of a *commissioner*, to adjust certain claims against the United States; and *the office of judges*, and *their respective jurisdictions*. are referred to in the law merely as a *designation of the persons* to whom the authority is confided, and the territorial limits to which it extends."

12. The opinion was made upon the illegal assumption that "the treaty meant nothing more than the tribunal and mode of proceeding *ordinarily* established on such occasions," meaning an ordinary board of commissioners, such as was provided for by the 11th article of the said treaty.—(See 9th and 11th articles of treaty and acts to carry them into effect.)

13. The opinion was made upon the erroneous assumption that no process was required to bring the claims before the court, and that "*the acts of Congress require no petition*" for that purpose.—(See act of March 3, 1849, 9 Stats. at Large, p. 788.)

14. The opinion was made upon the erroneous assumption that "the question as to the construction of the law" of 1792 "*was not decided in the Supreme Court.*"—(See certified copy of decision of Supreme Court, in the case of Yale Todd, of February 17, 1794.)

15. The opinion was made upon a misunderstanding of the extra-judicial opinions of the judges in the note to Hayburn's case; and also as to the acquiescence of the executive and legislative departments of the government, at that time, in the opinion that the judges could act as commissioners under the act of 1792.—(For repealing act of February 28, 1793, and joint resolution of June 9, 1794; see them cited post.)

16. The opinion was founded upon the erroneous assumption that the acts of 1792 and 1823 were "the same in principle."—(See the acts.)

17. The opinion erroneously assumes that "neither the evidence nor the award are to be filed in the court in which he (the judge) presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided, to the Secretary of the Treasury."—(See act of March 3, 1823, and the record on file in this case; Rhode Island *vs.* Massachusetts, 12 Peters, 750, 751.)

18. The opinion relies upon the extra-judicial opinions or letters of the judges, addressed to President Washington, to be laid before Congress; which opinions were not given in any case brought judicially before the judges, and were given without argument or judicial deliberation, and which were, after full argument and judicial deliberation, unanimously overruled in the Supreme Court, by the same judges, in the case of Yale Todd.—(Am. State Papers, vol. 1, Miscellaneous, pp. 49, 50, 51, 52, 53, 78; special message of President to Congress of Nov., 1792, Ho. Journal, vol. 1, pp. 614, 649, 659, 666; Annals of Congress, 2d Congress, from 1791 to 1793, pp. 556, 557, for memorial of Hayburn to Congress; same book, p. 803, for amendment requiring judicial decision by Supreme Court; ibid, 3d Congress, Supreme Court decision in Todd's case, reported to Congress by Secretary of War; for Pension act of March 27, 1792, see 2d vol. Laws U. S., 1 Stats. at Large, p. 243; for act repealing same, see

Stats. at Large, vol. 1, p. 324; for joint resolution of Congress of June 9, 1794, rejecting all pension claims allowed by judges as commissioners under the aforesaid act of 1792, see Stats. at Large, vol. 1, p. 401; Ram. on Legal Judgment, p. 183; 2 Bing., 292, 297, 303.)

19. The first opinion, delivered before the case of Yale Todd was brought to the attention of the court, shows that the case of Ferreira was disposed of without full examination, upon the authority of the extra-judicial opinions of the judges set forth in the notes to Hayburn's case. That opinion declared that "the question as to the character in which a judge acts in a case of this description *is not a new one*. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dallas, 409," (p. 4.) After setting forth these extra-judicial opinions, which had been overruled by the Supreme Court in Todd's case, the opinion adds: "After the decision thus made in 1792, and acquiesced in at the time by the other departments of the government, we think that the question must be regarded as *settled*, and not now *open to controversy* under the act of 1823."—(Printed opinion first delivered, on file in the office of the clerk of the Supreme Court.)

20. The note appended to the said decision "by order of the court," after the decision in the case of Yale Todd was brought to its notice, divests the said decision of all authority, and leaves the decision of the Supreme Court in the case of Yale Todd—*that the judges could not act as commissioners under the act of* 1792—in full and unimpaired force.—(See note.)

21. The opinion is not authority, because of various other mistakes of law and of fact apparent on its face.—(1 Stark. Ev., pp. 257, 260 to 308.)

CHARLES E. SHERMAN,
A. ANDERSON,
Counsel for Claimant.

[From the Washington Union of February 25, 1855.]

FLORIDA CLAIMS.

HOUSE OF REPRESENTATIVES,
February 23, 1855.

To the Editor of the Union:

DEAR SIR: The publication of Hon. J. L. Orr's speech in reference to certain Florida claims induces me to request that you will also publish the replies of Mr. Stanton, of Tennessee, and myself, as well as the accompanying correspondence, which I deem important in explanation of a point in the discussion not anticipated. This favor will be but an act of justice to my constituents, and I trust you will oblige, very respectfully, your obedient servant,

A. E. MAXWELL.

HOUSE OF REPRESENTATIVES,
Washington, February 17, 1855.

SIR: It having been stated on the floor of the House of Representatives, in reference to the East Florida claims under the treaty of 1819, that "those who alleged they had suffered, and chose to present their claims, presented them, and they were audited, and nothing was said or done to protect the government from the most enormous frauds being perpetrated," will you be so kind as to answer, at your earliest convenience, the following questions, with a view to rebutting this charge, or, if true, confirming it?

[See interrogatories in the answers of Mr. Young.]

An early answer will greatly oblige, your obedient servant,

A. E. MAXWELL.

McCLINTOCK YOUNG, Esq.

WASHINGTON, *February* 21, 1855.

SIR: In compliance with your request, I have the honor to transmit to you answers to the interrogatories propounded to me by you, in relation to East Florida claims for losses of the inhabitants in 1812 and 1813.

Yours respectfully, McC. YOUNG.

Hon. A. E. MAXWELL,
House of Representatives.

Answers of McClintock Young to certain interrogatories propounded to him by Hon. A. E. Maxwell.

1st inquiry. Have you any interest, direct or indirect, present or prospective, in these Florida claims?

Answer. I have not.

2d inquiry. Were you not connected with the Treasury Department whilst the East Florida claims, under the act of 1834, were acted on? and if so, what position did you hold?

Answer. I was chief clerk of the Treasury Department when the East Florida claims, under the act of 1834 were acted on by Secretaries Woodbury, Ewing, Forward, Spencer, Bibb, Walker, and during a part of Mr. Meredith's administration of the department.

3d inquiry. What was the course adopted by the department in examining and revising these claims, to guard against improper payments?

Answer. The course adopted by the several Secretaries above named, in acting on these claims, was invariably to refer the reports of the judge of the eastern district of Florida to some one or more of the subordinate officers of the department, to report their opinions on the testimony in each case, and then decide on the award made by the judge.

4th interrogatory. Was not the scrutiny of the department just as thorough in regard to them as it was in regard to claims without previous adjudication?

Answer. Fully as much as if the testimony had been submitted directly to the department.

5th interrogatory. What was the usual price per pound allowed for cotton; and on what evidence was that price sanctioned by the department?*

Answer. To the best of my recollection, fifty cents per pound was generally allowed for Sea Island cotton. In some cases, I think, as high as seventy-five cents were allowed. The evidence on which the judge made his awards was invariably laid before the department, and after the most careful examination of that evidence the award was acted on by the Secretary.

6th interrogatory. What price was allowed for sweet potatoes; and do you recollect any instance where "from $2 to $5 per bushel" was allowed for them?

Answer. Fifty cents were generally allowed. I remember no case where from $2 to $5 were paid; but, to answer fully this interrogatory, I would have to examine every case acted on. I have only to say that no award was made by the judge in any case which did not accompany with the evidence before him in the matter. With regard to the prices paid for sweet potatoes, I must say that, if different amounts were allowed to different claimants, it must have been on the testimony taken and reported by the judge in the respective cases. The claims for potatoes were of no great amount.

7th interrogatory. What was the rule adopted by the department in making allowance for crops prevented from being made in 1813; was it not done by the advice of the Attorney General?

Answer. To the best of my recollection, an allowance for the *crops* of 1813 was founded on that of 1812—two-thirds of this were generally, if not always, allowed for the estimated crops of 1813. As to any opinion of the Attorney General on this subject, I have no recollection, excepting one by Mr. Legaré santioning the principle. †

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* To show the high prices of cotton in 1812 and 1813, during the war with England, the following references are made to Niles' Register:

In the number dated December 25, 1813, the price of *short* staple cotton is stated as follows:

"Cotton sold in Baltimore last week for forty cents per pound by the quantity. It has been sold at that price in Philadelphia."

Vol. 6, page 184, No. for May 14, 1814, is the following statement:

"Sea Island cotton at Liverpool, March 4, one dollar. Upland, three shillings and six pence sterling."

Vol. 10, page 205. The prices of *Sea Island* cotton are stated at from two to four shillings sterling per pound, being from forty-five to ninety cents per pound.

The Charleston (S. C.) Courier of February 9, 1855, quotes the price of *Sea Island* cotton as follows:

"Fine, from thirty-two to forty cents; and fine and very fine, from forty-five to fifty-five cents and upwards, as in quality."

† The following is an extract from the opinion of Attorney General Legaré, of 25th October, 1841, in the case of Bunch's executor, referred to by Mr. Young:

"There can be no difficulty about a crop actually made, and ready to be gathered; there is, *in principle*, none as to the liability of any one by whose trespass or default it is proved that the making of a crop has been prevented. It is clear he must make reparation as far as the extent of the injury can be ascertained.

"That he should be exonerated from the responsibility by reason of any uncertainty as to the measure of the wrong he has inflicted were to allow him to take advantage of his own delinquency. If it be uncertain what the crop would have been, who is to blame for that uncertainty but the invader that prevented its actually being made?"

8th interrogatory. Did the department in any instance allow more than what was conceded to be, after the closest scrutiny, the fair original value of the property destroyed?

Answer. I cannot recollect an instance in which the Secretary, acting on an award by the judge, allowed more than the amount awarded by him. When I was in the Treasury, I believe every Secretary examined fully every case before he directed the payment. The Secretaries always allowed the fair original value of the property proved to have been destroyed.

9th interrogatory. Was it not the practice of the department to recommit these cases to the judge for further testimony, whenever any doubt arose as to the price or quantity of the property, before sanctioning the award of the judge; and do not the records show that the witnesses were all cross-examined, personally or by interrogatory, by the judge, and the commissioners to take deposisions selected and instructed by him, and was not the department in constant correspondence with the judges whilst adjudicating these claims?

Answer. The department often referred back cases to the judge for further examination and testimony, when doubts were presented or suggested on any points. The copies of the records returned by the judge show invariably that, in all cases necessary, cross-examinations were made by him or under his direction. Frequent correspondence occurred between the department and the judge on the subject of these claims.

10th interrogatory. Are you aware that any Secretary ever entertained a doubt as to the caution or integrity of the judge in protecting the interests of the United States?

Answer. None of the Secretaries before mentioned, at any time, ever expressed to me a doubt as to the caution or integrity of the judge in protecting the interests of the United States. The Secretaries I refer to are Secretaries Woodbury, Ewing, Forward, Spencer, Bibb, Walker, and Meredith, against either of whom no one but the most besotted political partisan can utter a word affecting their honor or integrity in the discharge of their duties as Secretaries of the Treasury.

11th interrogatory. Do not the records show that most of these claims arose from the most wanton and useless destruction of property?

Answer. The testimony in the cases acted on by the judge does certainly show most wanton and useless destruction of property. I feel sorry in saying so, but truth compels me to answer the interrogatory.

12th interrogatory. Were not a large part of these claims acted on while you were in the department?

Answer. A great number, if not a large majority, of these claims were acted on and decided by the department during the period whilst I was the chief clerk.

13th interrogatory. In deciding these claims was any reference had to the treaty or laws of nations by the department, or were they governed exclusively by the usages in regard to domestic accounts?

Answer. In deciding these claims, so far as I can recollect, the department was governed exclusively by the usages in relation to domestic claims. I have no recollection that we ever looked beyond the

acts of Congress before referred to and the usages of the department. Indeed, I feel certain that the laws of nations, and the treaty stipulations founded thereon, were not thought of, simply because we considered we were acting under acts of Congress, and were bound to decide, as in all other cases, where interest was not specially allowed.

14th interrogatory. Were the original records, or certified copies of the petitions, evidence, and decrees sent to the department?

Answer. Certified copies were only sent to the department by the judge.

15th interrogatory. Did not all the Secretaries consider that the judges acted under their commissions as judges, and were their decisions rejecting claims made final?

Answer. I cannot respond to this interrogatory otherwise than by saying that the Secretaries did often revise the awards of the judge, and reconsider decisions on such awards, on arguments or additional testimony submitted, in all cases through him, (the judge.)

I have no recollection that in any case was any amount allowed by the department greater than that awarded by the judge as the value of the property destroyed. When the judge rejected a claim such rejection was never reported to the department; it was final, there being no power to appeal.

McCLINTOCK YOUNG.

FEBRUARY 21, 1855.

Decision of Hon. Isaac H. Bronson, judge of the district court of the United States for the northern district of Florida, in the matter of the claim of Francis P. Ferreira, administrator of Francis Pass, deceased, vs. the United States, under the ninth article of the Florida treaty, delivered August 30, 1851.

Before the judge of the district court of the United States for the northern district of Florida, at an extra term of said court, held at the court-house, in the city of St. Augustine, on the 26th day of July, 1851, and continued by adjournment on various days to the 30th day of August in the year 1851.

In the matter of the claim of FRANCIS P. FERREIRA, administrator of FRANCIS PASS, deceased, *vs.* THE UNITED STATES, for losses in East Florida in 1812 and 1813.	*Decision and award.*

This claim is one of a class arising under the last clause of the 9th article of the treaty with Spain of the 22d February, 1819, and under the acts of Congress of 3d March, 1823, and 26th June, 1834, intended to carry into effect that clause of the treaty; which acts will be more particularly adverted to hereafter.

The case comes before me, as judge of the United States district court for the northern district of Florida, by virtue of the 6th section of an act of Congress of the 22d February, 1847, (*vide* Pamphlet Laws of 1847, p. 23,) which provides: "That any unfinished business or proceedings now remaining or pending before the judge of the superior court at St. Augustine, as a commissioner under and by virtue of the 'Act for the relief of certain inhabitants of East Florida,' approved 26th June, 1834, or under any other act granting special powers or imposing special duties upon said judge, be, and the same are hereby, transferred to the judge of the district court of the northern district of Florida, to be proceeded in and finished, or decided in the same manner provided for by law; and the said district judge shall have, exercise, and possess the same duties, powers, and rights, which have, by virtue of the act of 26th June, 1834, aforesaid, or otherwise, been possessed and exercised by the said judge of the superior court at St. Augustine, so far as may be necessary to enable the said district judge to determine and finish any matter, business, or proceedings now pending and undetermined before the judge of the superior court aforesaid, by virtue of any such special act."

It is proper to remark, however, that this claim was not filed within the year prescribed by the act of 1834, above mentioned, but in virtue of a special act of Congress, approved 3d March, 1849, in favor of this and other claimants who had neglected to file their petition or claims within the time prescribed by the former act, and which act of 1849 authorizes and directs the judge of this district to receive and adjudicate this and certain other claims under the provisions of the act of Congress of 26th June, 1834.—(*Vide* Pamphlet Laws of 1849, p. 148.)

It is also proper that I should state that this petition was filed before me, and properly presented on the 28th February, 1850, and within one year from the passage of the act of 1849 above mentioned, and that the claimant has alleged in the petition, and proved to my satisfaction, reasonable cause for the petition not having been presented within the time prescribed by the act of 26th June, 1834, as will more fully appear by a reference to the petition and proofs hereto annexed.

The proofs having been completed in this case, the claim was submitted by Mr. Forward, of counsel for the claimant, upon the testimony and exhibits herewith reported, who insisted that the items of the claim as set forth in the petition were fully proved, and that the claimant was entitled to an award for the whole amount claimed, with interest. Mr. Sherman and Mr. Yulee, also as counsel for the claimant, appeared and argued the case on his behalf; and Mr. Call, district attorney of the United States for this district, also appeared on behalf of the United States, and in opposition to the claim, and presented certain points which he argued at length, and which, as well as the points and arguments of the claimant's counsel, will be more fully noticed hereafter.

The main features of this case are much like those of many others which have heretofore been adjudicated under the provisions of the 9th article of the teaty of 1819 with Spain, and the acts of Congress of 1823 and 1834 above mentioned.

I consider it well established, by the proofs in the case, that Pass was a Spanish subject, and inhabitant of East Florida in 1812 and previously; and that at the commencement of the patriot war or revolution in East Florida in March, 1812, he was, and had been for several years, living at a place then called Sampson or Sampson Creek, about twenty miles northwest of St. Augustine, where he was engaged principally as a stock grower, or in raising, butchering, and selling cattle for the St. Augustine market; that he had from five to seven hundred head of stock and beef cattle, which ranged in the vicinity of Sampson Creek; and that he also had three or four horses, a stock of hogs and poultry; and that he had cleared and in cultivation about twenty acres of cow-penned land, on which he raised corn, potatoes, &c., or such provisions as were necessary for his own use; and that he had a log house, and such furniture, tools, implements, &c., as were necessary for such an establishment.

That on the invasion of the country by the patriots and American troops in March, 1812, at the time they laid siege to St. Augustine, he, like other inhabitants of the country, was obliged to abandon his place of residence, and his property there and in that vicinity, and take refuge in St. Augustine, and that during the time that the American troops and patriots remained in the province and between the 17th March, 1812, and 10th May, 1813, (when the United States troops finally evacuated the province,) his place was frequently visited by parties of patriots and American troops; that his cattle and hogs were driven off and used by them; that his horses were also taken, his growing crops of corn and potatoes of that year destroyed, his house burned, and everything on his place plundered or destroyed.

The fact that he suffered these losses and injuries by the operations of

the American troops in East Florida, and that he was, from being in good and comfortable circumstances, reduced to a state of ruin and beggary in consequence thereof, and the particular amount or extent of the losses, will more fully appear by the evidence in the case; and without detailing it more minutely, but referring to the depositions accompanying this decision and award, I proceed to state that I consider the following items or allowances sustained by the proofs in the case; premising, however, that in this as in other cases, in estimating the value of property at that period, I am governed not alone by the proofs in this particular case, but the general testimony of many intelligent witnesses in a great many cases of the like kind, heretofore decided and reported to the Secretary of the Treasury, showing the general market value of corn, cattle, hogs, horses, and other property in this portion of the province of East Florida at that period.

I allow, then:

For loss of crops of 1812	$350 00
For loss of corn on hand of the crop of 1811, say 100 bushels, at $1	100 00
Two horses and one mare, at $40 each	120 00
Hogs, say one hundred and fifty head, at $2 50	375 00
Beef cattle, say four hundred head, at $10	4,000 00
Stock cattle, say two hundred head, at $5	1,000 00
Household furniture and plantation tools	110 00
Poultry	25 00
	$6,080 00
Interest on this amount, at five per cent. per annum, from the 10th May, 1813, to the 26th June, 1835	6,726 83
Making in all	$12,806 83

I do therefore award the above amount in favor of the claimant, and adjudge and decide that the United States pay to the said Francis P. Ferreira, as administrator of Francis Pass, deceased, the aforesaid sum of twelve thousand eight hundred and six dollars and eighty-three cents, in satisfaction of the losses and injuries suffered and sustained by the said Francis Pass, deceased, in his lifetime, and in the years 1812 and 1813, by the operations of the American troops in East Florida in those years.

In respect to the interest which I have allowed in the above estimate, as a part of the damages for the injuries in question, or as a means of measuring the extent of the claimant's damage for the loss of the use of his property, I would remark, that it is substantially the same allowance which has always been made by me in these cases, and also by my predecessor, Judge Reid; though hitherto the interest has not been computed and added to the principal sum or value of the property, but, nevertheless, has been as distinctly awarded and made a component part of the award, or intended so to be, as in this case.

In some few of the first cases of these claims which were adjudicated by me, (perhaps two or three,) I awarded "interest according to the usage which has heretofore prevailed in the adjustment of these claims."

This was in 1840, and immediately after I was first appointed judge of the late territorial superior court of the district of East Florida. In a short time, however, I learned that the Secretary of the Treasury had in all cases declined to pay the interest so awarded; which fact induced me to examine the point with more carefulness, and to endeavor to ascertain, to my own satisfaction at least, whether interest should be allowed as a part of the damages. My investigations then, as well as subsequently, resulted in a conviction of the entire correctness and justice of the allowance; and hence I continued to allow it, and have always awarded it as a part of the damages in every case decided since that time, deeming it my duty to make *such* allowances, and to fix the amount of damages at such sum as I deemed *just* and *right*, without regard to any opinion which the Secretary of the Treasury might entertain, or any decisions which he might make. For although the laws of Congress required me to report my decisions or awards when in favor of the claimants to the Secretary of the Treasury, in order that he should pay the *amount thereof* "if he deemed them just and equitable within the provisions of the treaty," yet I never for a moment supposed that it was the intent of the act of Congress to make the Secretary an appellate tribunal of such a character that his decisions would be binding upon me and control my action and opinions; and although I have always been disposed to yield to them all due regard and consideration, as of right belong to the opinions of a high public functionary, yet I have ever considered that I had no right to yield up that independent action which the law required of me, or to sacrifice my own convictions of right and justice in deference to the Secretary's opinion. The investigations above mentioned, however, induced me to think that the interest ought to be limited within certain periods, viz: from 10th May, 1813, when the American troops evacuated the country, to the 26th June, 1835—the latter being the period within which, by the law of June, 1834, the claimants were authorized and required to file their petitions and present their claims for adjudication.

The reason so frequently given for the alleged rule, that the government does not pay interest, viz: because it is always ready and willing to pay all just claims when properly presented, had its influence with me in adopting this rule, (a *reason*, by the way, which, however correct in theory, *may* not be, and certainly is not always so in fact, and, like other general rules, is subject to many exceptions.)

Previous to the act of June 26, 1834, there was no mode by which these claimants could approach the treasury and seek the payment of their claims—Secretary Rush having decided that the injuries of 1812 and 1813 were not within the provisions of the treaty, or the law of March 3, 1823.

The law of 1834, therefore, first opened the door by which they could present these cases and make the proper proofs to obtain payment; and by this law they were required to file their claims before the judge within one year from the passage of that act, viz: by the 26th June, 1835. This was virtually a tender of payment to all who would present their claims to the judge, make the necessary proofs, and obtain his award. This they were equitably bound to do with all reasonable diligence; and I considered that allowing them one year to accomplish

this was enough at least to exonerate the United States from paying interest after that time, if, from their own default or negligence, they did not see fit to prosecute their claims and obtain the decision of the judge within that period. In regard to the period at which interest should commence, it was not always, or even often, easy to fix the precise day of the losses or injuries; they generally occurred at different times, running through a period of weeks or months, but all between March, 1812, when the American troops first entered the province, and May 10, 1813, when they finally evacuated it. Hence I have assumed the 10th May, 1813, as the day from which interest as part of the damages should commence to run.

Acting upon these principles, I have, as before stated, uniformly allowed interest in the manner above stated, intending it as a component part of the amount of damages awarded in each case. The number of cases thus adjudicated by me is, in all, about one hundred, and running through a series of years, from July, 1840, up to the present time. The rate of interest allowed, (5 per cent.,) it is understood, was the prevailing or legal rate of interest in East Florida at that period.

The present is the first case wherein the government of the United States, as well as the claimant, has been represented by counsel before me, and wherein this question of *interest* has been fully discussed.

The district attorney of the northern district of Florida, under instructions from the proper executive department at Washington, has appeared before me to represent the interests of the United States in this and other cases, and Mr. Forward, Mr. Sherman, and Mr. Yulee, as counsel for claimant; and, at the solicitation of both parties, an extra term of the court was ordered, to the end that they might present their views in this and other cases before me in open court. They have done so, accordingly, not only on this question in regard to interest, but also on other points, which will be hereafter more particularly noticed; and besides the very able and elaborate arguments and briefs submitted to me by the gentlemen above named, at the close of the argument, Judge Douglas likewise submitted a written brief and argument, and General Hernandez also submitted a copy of the written argument of Mr. Fallmadge on the same question, addressed to the Secretary of the Treasury, in September, 1843, as well as a copy of his own letter to the Secretary of the Treasury, of the 17th September, 1847.

I have already remarked that my opinion of the justice and propriety of allowing interest had been formed after the most considerate examination; but it is at least due to the very able and elaborate expositions of the question which have taken place before me in this case, to say that that opinion has been strengthened, and the correctness of it verified, in a manner so perfect and satisfactory that no room is left for doubt in my mind. And in view, also, of the fact that my awards for interest as part of the damages in these cases amount in the aggregate to more than half a million of dollars, I deem this a fitting and proper occasion to explain at length the grounds and reasons of these allowances, and to justify this item of my decrees against the government.

In order, however, to a right and proper understanding of this question in all its bearings, it is necessary to recur somewhat particularly to the history of these claims, and to the events which led to the "*injuries*" complained of by the claimants, and to show the character of them; and, in doing so, I refer not only to facts, which have been proved by the depositions of many credible witnesses, in various of these claims which have been reported to the Treasury Department, but to the official correspondence and documentary history of that period.

For some time previous to 1812 the United States had looked to the acquisition of the provinces of East and West Florida as the only probable means of obtaining any indemnity from Spain for the large sums which she admitted to be due from her for spoliations and depredations upon our commerce, and for suppression of the right of deposit at New Orleans. Besides this, too, the geographical position of the Floridas was such that their possession had become a matter of the first importance to the safety of the United States; and the possibility of their passing into the hands of Great Britain, or any other foreign power, was looked to with great jealousy and distrust, and as a measure endangering the prosperity and best interest of this republic.

These circumstances led to the passage of the joint resolution and secret act of Congress of the 15th January, 1811, (*vide* Stat. at Large, vol. 3, pages 471 and 472;) by the latter of which the President was authorized to take possession of the Floridas "in case any arrangement has been or shall be made with the local authority of said Territory for delivering up the possession of the same, or any part thereof, to the United States; *or*, in the event of any attempt to occupy the said Territory, or any part thereof, by any foreign government." And for that purpose the President was authorized by the act to employ any part of the naval or military force of the United States, and one hundred thousand dollars appropriated to defrav expenses, &c. Under this act, General George Matthews and Colonel John McKee were appointed by the President to act as agents or commissioners on behalf of the United States, with secret instructions "*to repair to that quarter with all possible expedition,*" for the purpose of carrying out the intentions of the act, and, if necessary, to call to their aid the naval and military forces of the United States in that quarter of the Union, the commanders of which had been instructed to render obedience to their orders, (*vide* Letters of Instruction from State Department, in American State Papers, vol. 3, Foreign Relations, page 571.) It does not appear that Col. McKee ever accepted the trust, or acted under it; but Gen. Matthews immediately repaired to the Florida frontier, and took up his residence at St. Mary's. He very soon learned, however, that no voluntary surrender of this province from the "*local authorities*" could be expected; that the governor of East Florida was most loyal and faithful to his king, and could not be tampered with or approached with impunity; nor was there any movement or indication of an attempt, on the part of Great Britain or any foreign power, which would justify the forcible seizure or possession of the province under the second contingency mentioned in the act of Con-

gress. Under these circumstances, and actuated apparently by a mistaken zeal to do something, and to get possession of East Florida at all events, he set about fomenting a rebellion, or revolution, in the province, and thereby creating a "*local authority*" who would surrender the province to the United States, and put it in their possession. And this, too, was no easy task; for there was no well-grounded cause of complaint on the part of the inhabitants against the provincial government of Spain in this province, and no grinding oppressions which were at all provocative of insurrection On the contrary, the province was in a state of high prosperity, and, as a general rule, the people were contented and happy. The culture of sea-island cotton, the staple of the province, was particularly profitable, the average price being fifty cents per pound. Timber, also, which the government allowed its subjects to cut from the public domain free of charge, bore high prices, and a steady and increasing demand for it absorbed all the surplus labor of the province. The town of Fernandina, on Amelia island, was a kind of neutral or free port, at which a large and lucrative trade was carried on with all nations; and if left to themselves, it cannot be presumed that revolution or insurrection would have been thought of by the inhabitants or Spanish subjects of East Florida. General Matthews, however, soon succeeded in conveying the impression, not only that he was the accredited agent of the United States government, and, as such, authorized to take possession of East Florida, but that the United States were determined to obtain possession of the province at all events; and using both persuasion and menace, it is manifest enough that he induced those who first engaged in the rebellion as leaders, to believe that the province would soon pass into the hands of our government, and that, if they aided in the outset to produce this desirable result, their services would be suitably remembered and rewarded; while, on the contrary, if they interposed obstacles to the measure, and refused to embark in the enterprise, they would incur the displeasure of the government of the United States, and might fare the worse for it whenever Florida should be incorporated into the Union. It should be borne in mind, too, that these considerations were addressed to the frontier inhabitants in the northern part of the province, who were mostly men who had been born and bred in the States, under a republican form of government, and who had moved from the States into Florida and become Spanish subjects, but who, of course, retained their prejudices for the free institutions of this country. The result was, that, by these influences and considerations, and by the promise of arms from the United States arsenals, and the aid of the army and navy of the United States, and, above all, by a promise from General Matthews that, as soon as they succeeded and established a temporary government, he would receive from them a cession of the province in behalf of the United States, and, with the aid of the naval and military forces of the United States, he would take possession of and defend it, an insurrection or rebellion was finally organized, and a party of men, supplied in part with arms from the United States arsenal at Point Peter, assembled at Rose's Bluff, a point on the Florida side of the St. Mary's river, a short distance from the town of St. Mary's, about the 14th March, 1812, and

then raised the patriot flag, or standard of revolt, against the provincial government of East Florida; and having selected temporary officers and rulers, under the immediate superintendence of General Matthews himself, who was present in person, they finally moved down to attack the town of Fernandina, after having had some negotiations with the Spanish commandant, and trying in vain to induce him to surrender it. Some accounts state the number of this body of men at three hundred and fifty-seven; other accounts at two hundred and fifty; but all agree that only a small portion of them were Spanish subjects, or persons residing in Florida—probably not over fifty; the remainder were adventurers from Georgia, or the adjoining States, among whom probably were many worthy men, who, acting under the influence and representations of General Matthews, no doubt believed that they were acting in accordance with the wishes of the United States government.—(*Vide* the testimony of Archibald Clark and others, annexed to this case.)

Some witnesses say that there were not more than four or five Spanish subjects among the so-called patriot forces that made the descent upon Fernandina, and to whom the town finally surrendered, and that the remainder of the patriot army was made up of volunteers from the United States.

This movement took place on the 16th March, 1812, on the morning of which day several of the United States gun-boats, from the flotilla under the command of Commodore Campbell, ranged themselves in front of the town, in hostile attitude, with guns loaded and matches lighted, apparently to cover the landing of the patriot troops, and did cover their debarkation; whereupon the Spanish commandant, seeing that the insurgents were, as he supposed, sustained by the United States forces, surrendered the town to the patriots, who took possession and raised the patriot flag. During the next day, however, a detachment of United States troops were brought over from Point Peter, and the newly-constituted patriot government surrendered the town to General Matthews, as agent of the United States government, who took formal possession, in the name and on behalf of the United States, and promised to defend and protect the country; and the patriot flag was then struck, the United States flag run up, and the town occupied by the United States regular soldiers.

Within two or three days the patriots, accompanied by Colonel Smith's regiment of regular troops, or some part of it, and volunteer troops from Georgia, commenced their march towards St. Augustine, to lay siege to that place. Some of the United States regular troops, however, went in gun-boats by the way of the St. John's, and up that river as far as Picolata, and marched across from there and effected a junction with the main body before St. Augustine.

On the march through the country, the patriot troops were generally a little in advance of the American forces. They would take possession of the country in form, run up the patriot flag, and then, *as* the "*local authority*" of the country, surrender it to the United States agent and troops, who would receive possession in form, whereupon the patriot flag was hauled down and the United States flag substituted. In this way they proceeded without opposition to the walls of the city of St.

Augustine, and laid siege to that place in the latter part of March, 1812, the United States agent (General Matthews) usually marching and camping with the patriot leaders.

It is worthy of remark, however, that all the witnesses who have spoken of these transactions concur in expressing the opinion that, but for the aid, countenance, and protection of the United States forces, these patriots, so called, could have made no progress whatever; that not only would their efforts at overturning the provincial government have been entirely abortive in the outset, but that they could not at any time during the insurrection have maintained themselves or their position in the country for a week if unaided by the American troops.

In the meantime, during the march through the country to St. Augustine, every effort was made to induce the inhabitants of the country, both by persuasions and threats, to join this invading army, or take part with the patriots, declaring that they would leave no neutrals in the rear; that those who would not join must leave the country, hinting at confiscation, and promising protection of person and property to those who would join them. Scouting parties were sent out, and many of the most influential and respectable inhabitants brought as prisoners to the American camp, and kept under close surveillance until they would consent to join the cause.

The approach of this "horde" towards St. Augutine spread universal panic and alarm. The Spanish governor sent out into the country, warning all the loyal inhabitants to come in and aid in the defence of the city; and many, either in obedience to the order, or from motives of self-protection, fled from their places of residence in the country, and took refuge in the city, which was immediately closely besieged by the American and patriot forces, and the whole country east and out h of the St. John's river, as well as north of it, was left completely xp o sed, and entirely at the mercy of these invaders.

The difficulty of obtaining supplies for such a force led them at once to look to the resources of the country; and the large droves of cattle with which the country then abounded were immediately and unhesitatingly seized upon to relieve their necessities, and foraging parties, consisting both of regular troops and patriots, were sent out in all directions to collect cattle and other means of subsistence for the army. These foraging parties most generally consisted of the patriot or volunteer troops, sometimes under the command of a regular officer, but the fruits of their expeditions were usually shared by the American and patriot troops indiscriminately. The cattle which they drove into camp, or collected and retained at the posts and stations in the country, to be used from time to time as they were wanted, were used by the regulars as well as the volunteer troops and patriots.

All accounts and witnesses concur in stating that the American troops and patriots acted in close concert and alliance; that they marched together, camped together, and foraged together, and fought together; and that the operations and presence of the American troops sustained the patriots.

Besides the camp of the American and patriot troops before St. Augustine, there were also, from time to time, several other camps and stations about the country occupied by United States troops or

volunteers and patriots, from whence marauding and foraging parties were constantly going forth; and in the course of the summer and fall almost every plantation and farm had been visited and plundered. Most of them had been abandoned by their owners, but whether abandoned or not, the foraging parties usually helped themselves to what they wanted or could find. The corn on hand in the corn houses, of the previous year's crop, was eagerly sought for and soon used up; the fences thrown down, and the growing crops exposed to destruction, as well as used or fed upon by their horses; movable property of every description plundered or destroyed, and buildings and fences burned, sometimes from design, (especially when the owners were particularly loyal to the Spanish government,) and often by accident, from camp fires, or negligence in occupying the buildings; and the cattle and hogs in the ranges killed or driven off to the camps of the invading army. And this state of things continued, but growing daily worse, and worse, until the American troops were finally withdrawn from the province in May, 1813.

During this time, however, and before the evacuation of the province, other American troops came into it besides those which have already been mentioned as having made the first incursion; some small parties or companies of regulars or volunteers joined the forces before St. Augustine; and in the summer or fall of 1812 Colonel Newnan entered the province, with a battalion or detachment of volunteers; and after remaining a short time on the St. John's river, made an expedition into the interior against the Seminole Indians; and in the spring of 1813, I think, a battalion of Tennessee volunteers, under Colonel Williams, came into the province, and acted under or in concert with Colonel Smith. And, if I mistake not, this was the same gentleman who, in offering to the government to raise a corps of volunteers for service on the southern frontier, pledged himself that none of them should "entertain any constitutional scruples about *boundaries*." Whether any of the injuries in question were occasioned by the operations of these troops, I do not now remember, but certainly some were by Newnan's corps.

A detail of some of the more revolting instances of robbery and plunder and wanton destruction on the one hand, that occurred during this period, or of individual cases of hardship, ruin and beggary on the other, is hardly called for, and perhaps not proper in this general statement, though they might tend much to illustrate the general character of the injuries of that period. Suffice it to say, that before or when the United States troops finally evacuated the country, the whole inhabited part of the province was in a state of utter desolation and ruin. Almost every building outside of the walls of St. Augustine was burned or destroyed; farms and plantations laid waste; cattle, horses, and hogs driven off or killed, and movable property plundered or destroyed; and in many instances slaves dispersed or abducted. So far as the destruction of property of every kind was concerned, the desolation of the Carnatic by Hyder Ali was not more terrible and complete.

It is but proper to observe, however, that as soon as the United States government was officially made acquainted with these proceedings, and

with the operations of General Matthews and the United States troops, they promptly disavowed the act, revoked General Matthews' powers, and appointed Governor Mitchell, then governor of Georgia, as the agent of the United States in place of General Matthews, with instructions to withdraw the American troops, and "to restore back to the Spanish authorities Amelia island and such other posts of East Florida as had been thus taken from them."—(*Vide* letter of Mr. Monroe, then Secretary of State, to Governor Mitchell, of 10th April, 1812, American State Papers, Foreign Affairs, vol. 3, page 571.) In this letter, Mr. Monroe, after alluding to the fact that the troops of the United States had been used to dispossess the Spanish authority by force, says: "I forbear to dwell on the details of this transaction, because it is too painful to recite them." And in the course of this letter of instructions it will be observed that Governor Mitchell is especially directed to take care of the interests of those people who had acted with General Matthews, and been engaged with him in taking possession of the province, and to secure them against the resentments of the Spanish authorities, inasmuch as it was supposed at Washington (and very correctly, too) that they had placed much reliance on the countenance and support of the United States government; and on this point Governor Mitchell is directed to come to a full understanding with the Spanish governor, and "not fail to obtain from him the most satisfactory assurance respecting it." This point, as is well known, and also some others, led to much negotiation between the Spanish governor and General Mitchell, and delayed the evacuation of the province; and the American troops were not withdrawn, nor was the province finally evacuated or surrendered, until May, 1813, when General Pinckney was finally authorized, as the agent and military commander of the United States in this part of the Union, to withdraw the troops, and surrender or deliver up the province to the Spanish governor. In the meantime the siege of St. Augustine had been raised, and the United States troops had fallen back to camp New Hope, on the St. John's, and other posts in the interior.

In this narrative of events which led to the losses or "injuries" in question, I have no doubt omitted many details which might make it more perfect, and perhaps add much to the general history of these transactions; but my aim has been only to relate so much as may be necessary to show clearly and correctly the character of the injuries complained of, and how and in what manner they occurred, with a view to a more perfect and full understanding of the nature and extent of the assumed obligation of the United States to make satisfaction for them.

For a more full history of these transactions, I refer to the correspondence between Mr. Monroe and Mr. Foster, at pages 543, 544, and 545, of the third volume of American State Papers, Foreign Relations, vol. 3; also to the documents communicated by the President to the House of Representatives on the 1st July, 1812, at page 571, &c., of same volume of American State Papers, consisting of instructions to General Matthews and Colonel McKee, Mr. Monroe's letter of recall to General Matthews, and also his letter of instructions to Governor Mitchell. There are also on file in my office duly certified copies of

sundry letters and documents which were found on file in the office of the Spanish archives at this place, consisting of the official correspondence between the American agent and officers and the patriot leaders on the one hand, and the Spanish officials on the other hand, between the 14th March, 1812, and the 10th May, 1813. These are numbered from 1 to 42 inclusive, and were furnished to Judge Reid, my predecessor, in September, 1834, and placed on file with the other papers relating to these claims, and I have always supposed that he transmitted a copy to the Treasury Department. Having no positive knowledge, however, that that fact is so, I now take occasion to furnish copies of these documents, which will be transmitted herewith.

The depositions of George J. F. Clarke, Winslow Foster, Zephaniah Kingsley, and Archibald Clarke, annexed to this case, as well as many others already reported to the Secretary of the Treasury, give many important details in regard to the general history of this period.

It is with no pleasure that I have narrated these transactions, or that I call attention to any further details, which I fear would only tend to deepen their hue or render them less excusable. It is an episode in the general history of the nation, which, as an American citizen, I could have wished might remain unwritten. And although I feel gratified to observe that the United States government promptly disavowed the proceeding, and endeavored at once to retrace their steps and to remedy the wrong, so far as they could with due regard to the safety and rights of those compromitted by the extraordinary course which had been taken by their agents and officers, yet they could not fully wipe out the stain, or do away the wrong which had been perpetrated towards the peaceable and unoffending subjects of a nation with whom we were at peace.

These, then, are the "injuries" for which the claimants in this and other cases seek satisfaction from the United States. And I will now proceed to the other grounds upon which that claim rests, occurring subsequent to events above related, and growing out of the treaty and the laws already referred to.

Against these proceedings Spain presented her most indignant remonstrance, which in her then weak and imbecile condition was all that she could do, except to claim satisfaction for the injuries which her subjects had been subjected to; but finally, 1819, when the treaty of amity, limits, and settlement, of the 22d February, of that year, was entered into, (by which the Floridas were ceded to the United States, and the very people who had been thus injured and plundered were transferred to the jurisdiction of the United States,) a clause was inserted in the 9th article of that treaty to provide for these injuries, and to make satisfaction for them, which is as follows: "The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants, by the late operations of the American army in Florida."

After the final ratification of the treaty, and in March, 1823, an act was passed by Congress, to carry into effect this 9th article of the treaty, which provides, in substance, that the judge of the superior court at St. Augustine shall receive and adjust these claims of the inhabitants

of East Florida, or their representatives, "agreeably to the provisions of the 9th article of the treaty." And in the second section it is provided, "that in all cases in which the judge shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judge reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is *adjudged*, out of any money in the Treasury not otherwise appropriated."—(See Stat. at Large, vol. 3, p. 768.)

Under this law, the judge of the superior court of St. Augustine proceeded to take cognizance of the claims filed before him, some of which were for injuries suffered by inhabitants of Amelia Island in 1818, and some for the injuries sustained by the operations of the American troops in this patriot war of 1812 and 1813. But upon reporting his decisions to the Secretary of the Treasury, Mr. Rush (who was then at the head of the Treasury Department) decided that the losses and injuries of 1812 and 1813 did not come within the provisions of the above clause of the 9th article of the treaty; that that clause only related to the "latest" or "last" operations of the American army in Florida. And that "late" (a word, by the way, not found in the Spanish version of the treaty) meant (in East Florida) only the operations of the American troops on Amelia Island in 1818, and covered only a few unimportant losses and injuries occasioned thereby. Application was immediately made to Congress by the inhabitants of East Florida for relief against this erroneous construction of the treaty and law of 1823. And, after years of effort and weary delay, an act for their relief was finally passed (6 vol. Stat. at Large, p. 569) extending the authority of the act of 3d March, 1823, to the losses and injuries of 1812 and 1813. This act, approved 26th June, 1834, provides that "the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of money in the Treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the territory of Florida, under the authority of the one hundred and sixty-first chapter of the acts of the seventeenth Congress, approved third March, one thousand eight hundred and twenty-three, for losses occasioned in East Florida by the troops in the service of the United States, in the year one thousand eight hundred and twelve and one thousand eight hundred and thirteen, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just: *Provided*, That no award be paid, except in the case of those who at the time of suffering the loss were actual subjects of the Spanish government: *And provided, also*, That no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States.

"SEC. 2. *And be it further enacted*, That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in one thousand eight hundred and twelve and one thousand eight hundred and thirteen, not heretofore presented to the

said judge, or in which the evidence was withheld in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February twenty-second, one thousand eight hundred and nineteen, between the government of the United States and Spain: *Provided*, That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided, also*, That the authority herein given shall be subject to the restrictions created by the provisoes to the preceding section."

The operation of this act, as well as its intent, was, to reverse the decision of the Secretary of the Treasury, and to bring all these cases of claims for losses in 1812 and 1813 within the provisions of the ninth article of the treaty and the act of Congress of the 3d March, 1823, before referred to. It has been sometimes supposed or suggested that this act of 1834 was a separate and distinct gratuity, independent of the treaty; and standing alone by itself was to be construed without any reference to the act of 1823, or the ninth article of the treaty. Any such idea is so manifestly erroneous and untenable, that I shall not stop to notice it, further than to say, that it has been repudiated by every Secretary of the Treasury who has acted under the law from 1834 to the present time, and that, so far as I am aware, every lawyer and every public officer of the United States, whose attention has been called to the subject, has uniformly held that the two acts of Congress of 1823 and 1834 were to be considered *in pari materia*, and to be construed together, as forming one act to carry out the provisions of the ninth article of the treaty. In fact, the act of 1834 contains in itself no appropriation or authority to pay the awards which may be made under the second section of that act, and no payment ever could have been made except by reference to and under the authority of the act of 1823.

I assume, therefore, at this point, the postulate, that the 9th article of the treaty is to be considered and looked to as the paramount law of the case, and that the acts of 1823 and 1834 are to be regarded as *subsidiary* to, and intended to carry into full and complete effect the provisions of the 9th article, and to secure to the claimants under that article the "*satisfaction*" therein guarantied to them; and hence that we are not to look merely to the municipal laws or regulations, either of this country or of Spain, as a guide to ascertain the precise extent and nature of the obligations of the United States under this provision of the treaty, but also to the laws and usages of nations—to those eternal and immutable principles of justice and equity which ought to govern nations in their intercourse with each other, and by which treaties and conventions are to be construed, and the obligations of nations with each other interpreted. In short, that it is a treaty stipulation—a national obligation or promise from one sovereign to another, and to be construed accordingly; and that the laws of nations, so far as they furnish any rules to govern the case, are to be resorted to in order to determine the measure of damages and nature or extent of "satisfaction," which is solemnly guarantied by the treaty to individual Spanish inhabitants who suffered injuries by operations of the American troops in East Florida; and that it comports not either with ordinary justice or national honor or dignity to attempt

to regulate the measure of damages which are to be awarded to those individuals by local or municipal regulations; and much less by some alleged ill defined custom or departmental usage of our own government. If authority is needed in support of this position, I refer to Mr. Wirt's opinion, (Opinions of Attorneys General, page 635,) wherein he quotes with approbation the language of Vattel, "*that the law of nature alone regulates the treaties of nations.*"—(Vattel, book 2, chap. 12, sec. 162.)

But before adverting to what I deem to be the well established law of nations on this subject, I would ask, what would be the impression of any ordinary mind, at all imbued with a sense of right and justice, on a question of this kind?

The inhabitants of Florida are, by an *unlawful* incursion of troops into their territory, despoiled of their property; their cattle and horses killed or taken and carried off; their movable property plundered or destroyed, and buildings burned. For all this, "*satisfaction*" is promised them; indemnification—recompense—compensation—payment; for they are all convertible terms, but "satisfaction" the most comprehensive of all.

Would it be considered a just and adequate satisfaction to pay to the individual suffering the injury, some twenty or thirty years after the loss occurred, the exact cash value of the property at the time the property was taken or destroyed, without adding interest or any sum whatever, for the loss or the use of the property in the mean time? The answer of any person, possessing either strong common sense or judicial wisdom, I think would be promptly in the negative. The manifest justice and equity of making some compensation for the loss of the use of the property, or prospective profits to be derived from it, is so obvious, that the mere statement of the proposition carries with it an unanswerable argument in its favor.

But without relying upon the obvious justice of such an allowance as part of the damages in such a case, or as a measure of damages, I think it would be found that not only the law of nations and the practice of our own government, but also the common and civil law, and (I think it might also be safely asserted) the municipal law of all civilized nations, concur upon this point, and equally authorize and require the allowance of this interest. Not interest *eo nomine*, but as a measure of damages for the loss of the use of the property in question. No doubt in many cases the value of the use of one's property is much more than the ordinary rate of interest of the country. The exact value of the use, or of the profits to be derived from the use of property, depends upon so many contingencies, and might vary so much from year to year, that it would be difficult for any court or board of commissioners to undertake to fix the precise amount of injury or damage which might in a given case, and for a series of years, fairly result from the destruction or loss of the property. If converted into cash, the money would, of course, produce the ordinary rate of interest then current in the country; and hence the allowance of *interest* in lieu of more specific damages has been adopted as a rule most obviously just, and as affording a reasonable remuneration on the one hand, while it avoids extravagant or exorbitant damages on the other,

though in municipal courts, and for private wrongs, it is usually considered the most mitigated measure of damages.

I proceed now to show the opinions of approved writers on the public law on this point.

Rutherforth, in his chapter on "Reparation for Damages done," lays down the rule thus: "In estimating the damages which any one has sustained, when such things as he has a perfect right to are taken from him and withholden or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the *fruits* or *profits* that might have arisen from it. He who is the owner of a thing is likewise the owner of such *fruits* or *profits*, so that it is as properly a damage to be deprived of them as to be deprived of the thing itself."—(Rutherforth's Institutes, book 1, ch. 17, § 5.)

This authority is cited by Mr. Pinkney, and relied upon by him in his argument as one of the commissioners under the treaty of 1794 with Great Britain.—(Vide Wheaton's Life of Pinkney, pages 261 and 262.

Reprisals are one mode of obtaining satisfaction by nations for alleged injuries; and that satisfaction, according to *Vattel*, and other good authorities on the subject, is "payment of what is due, *together with interest* AND DAMAGES." Vattel, in speaking of reprisals, says: "If a nation refuses to pay a debt or repair an injury, or give adequate satisfaction for it, the latter may seize something belonging to the former and apply it to her own advantage till she obtains payment of what is due to her, *together with interest and damages*, or keep it as a pledge till she has received ample satisfaction."—(Vattel, book 2, ch. 18, sec. 342.)

Mr. Wheaton, also, in his work on international law, lays down the same rule in regard to *reprisals*, and quotes the above sentence from Vattel.—(Wheaton's International Law, part 4, ch 1, sec. 3.)

Grotius also says that "the loss or diminution of any one's possession is not confined to injuries done to the substance alone of the property, but includes everything affecting the produce of it, whether it has been gathered or not," &c.—(Campbell's Grotius, vol. 2, ch. 17, sec. 4.) And again, in sec. 5 of the same chapter, this author says: "Damages are to be computed, too, not according to *actual* gain, but according to the *reasonable* expectation of it, which in case of growing crop may be judged of by the abundance or scarcity of that particular season."—(See also this 17th chapter of Grotius generally, on the subject of damages.)

But we have another source to which we can confidently look for a clear exposition of the law of nations on this point, and that is the prize courts of this country and Europe.—(Vide 1 Kent's Com., 68, 69, and 70. Wheaton's International Law, page 47.) And in 9 Cranch, 244—case of the Adeline and cargo, the Supreme Court of the United States, also say, that the "court of prize is emphatically a court of the law of nations, and takes neither its rules nor its character from the mere munipical regulations of any country."

Let us look, then, to see how the prize courts have dealt with this question, and what have been their decisions under it. In the case of the Amiable Nancy, 3d Wheaton, page 546, the Supreme Court of the

United States say, that in estimating the damages for property captured or destroyed, "the prime cost or value of the property lost, and in case of injury the diminution in value by reason of the injury, *with interest* thereon, affords the true rule for estimating damages in such cases."

So in the case of the Lively, 1st Gallison, 315, Judge Story says: "The proper measure of damages in cases of illegal capture, &c., is the prime value *and interest* to the day of judgment."

And in the case of the Anna Maria, 2d Wheaton, 327, Chief Justice Marshall lays down the same rule for ascertaining the amount of damage, viz "The value of the vessel, the prime cost of the cargo, with all charges, and the premium of insurance when it has been paid, *with interest*, are to be allowed." And again: in the case of the Appolon, 9th Wheaton, 362, the same rule is affirmed, and the court say: "The just measure of damages has been deemed to be the actual value of the property, *with interest*, upon the amount from the time of the trespass."

That such is also the rule of the British admiralty courts when sitting as prize courts, see the case of the Acteon, 2d Dodson, page 84, which is alluded to in Mr. Wirt's opinion of May 17, 1826.—(Vide Opinions of Attorneys General, pages 568, '69 and '70.)

In closing this citation of authorities going to show the public or national law, I cannot refrain from quoting the following language of Chancellor Kent: "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims, and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of established writers on international law."—(1 Kent's Com., pages 18 and 19.)

I next turn to the practice of our own government on this point, and I think it will be found that they have adopted this rule, and have uniformly insisted upon it against other nations, as affording the only just measure of satisfaction or indemnification for injuries.

The most important and leading cases which have occurred in the history of our government are those which arose between this country and Great Britain—the first under the treaty of 1794, and the other under the first article of the treaty of Ghent. In the latter case the United States, under the first article of that treaty, claimed compensation for slaves and other property taken away from the country by the British forces at the close of the war in 1815. A difference arose between the two governments, which was submitted to the arbitrament of the Emperor of Russia, who decided "that the United States of America are entitled to a just indemnification from Great Britain for all private property carried away by the British forces." A joint commission was instituted for the purpose of deciding and awarding upon the individual claims which were thus provided for; and one of the first questions that arose between the British and American commissioners was as to the measure of damage to be allowed, *i. e.*, what is a just indemnification for property taken or destroyed, and whether the claimants were entitled to interest as a part of the damages?

The British commissioner refused to allow the interest, but the American commissioner (Langdon Cheves) insisted upon its allowance, and in a series of the most able and unanswerable arguments demonstrated the correctness of his position.

The language of Mr. Cheves, in many instances, in the course of his arguments, applies with so much force to these cases that it is worthy of most particular notice. He says:

"The claim is not of interest, *eo nomine*, it is adopted as a mitigated rule of damages, compensation, or indemnification, founded on the estimated pecuniary value of the article withheld; in that case the common law and the civil law are both clear in allowing reparation of the loss of the use of the thing withheld from the commencement of the tortious detention. The rule of the public law is the same."

Again he says:

"Indemnification means a reimbursement of a loss sustained. If the property taken away on the 17th February, 1815, were returned now uninjured, it would not reimburse the loss sustained by the taking away and consequent detention; it would not be an indemnification. The claimant would still be unindemnified for the loss of *the use* of his property for ten years, which, considered as money, is nearly equivalent to the original value of the principal thing; so in substituting a pecuniary value for the thing, unless interest is allowed for the use of the money, the claimant will remain unindemnified."

Again:

"If interest be an incident usually attendant on the delay of payment of debts, damages are equally an incident attendant on the withholding an article of property; and when they are rendered in the shape of damages, they are usually given with a liberal and sometimes an unsparing hand.

"It is, then, a *mitigation* of the usual incident of damages for the detention of property, to establish a fixed and equitable rate of interest as the equivalent. There is no doubt that this is the leading reason why boards of commissioners, sitting as the representatives of nations, have so generally made interest the rule of damages, instead of a capricious discretion, which would perhaps often become an unjust and vindictive assessment of them."

In consequence of the disagreement of the commissioners, the commission was broken up, and the arguments and authorities submitted to the United States government, and the subject fully considered by it. The opinion of Mr. Wirt, then Attorney General, was called for by the Secretary of State, which opinion fully sustained the positions taken by Mr. Cheves in all respects.—(Vide Opinions of the Attorneys General, pages 568, '69, '70 and '71.)

Mr. Wirt, after alluding to the fact that the slaves and other property of American citizens had been taken away in 1815, and withheld from them ever since, says: "They have lost the use of their property eleven years: is the meagre return of the average value at the time the slaves and other property were taken, a just indemnification for the whole wrong? Is it consistent with the usages of nations, which Sir John Nicholl recognizes, to redress an act of wrongful violence

by the return, at any distant time, of the naked value of the article at the date of the injury?"

The government of the United States adopted and approved these positions, as will be seen by the letter of Mr. Clay, then Secretary of State, to Mr. Vaughan, the British minister, under date of the 15th April, 1826, in which Mr. Clay says: "We are prepared to show, if it were proper now to enter upon this discussion, that *interest* is a fair and just component part of the indemnification which the convention stipulates, and that *without interest* it would fall far short of the intentions of his Imperial Majesty's decision."

These claims, however, were finally compromised between the two governments, by accepting from the British government $1,204,960 as a gross sum, in satisfaction of the claims in question, Mr. Cheves having, as commissioner, previously reported to the government that the whole amount of all the claims would be about $1,250,000, including principal *and interest*. The interest included in his estimate was about $464,000. It matters not, however, I apprehend, how the claim was compromised, or what sum was received, unless the United States yielded the point of *interest*, which they did *not* do, but, on the contrary, must, from the above statement, have received more than $418,000 expressly for *interest*, as estimated by Mr. Cheves.

An earlier case, in which this principle of interest was involved, arose under the treaty of 1794 between the United States and Great Britain, in which there was a stipulation on the part of the British government in relation to certain losses and damages sustained by American merchants and other citizens, by reason of the irregular or illegal capture of their vessels and other property by British cruisers, and the 7th article provides, in substance, that "full and complete compensation for the same will be made by the British government to the said claimants."

A joint commission was instituted under this treaty, which sat in London, and by whom these claims were adjudicated. Mr. Pinckney and Mr. Gore were commissioners on the part of the United States, and Dr. Nicholl and Dr. Swabey on the part of Great Britain; and it is believed that in all instances this commission allowed *interest* as a part of the damage. In the case of "the Betsey," one of the cases which came before the board, Dr. Nicholl stated the rule of compensation as follows:

"To reimburse the claimants the original cost of their property and all the expenses they have actually incurred, *together with interest* on the whole amount, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations, and accepted by all neutral nations for losses, costs, and damages, occasioned by illegal captures."—(Vide Wheaton's life of Pinckney, page 198; also 265, (note,) and page 371.)

By a reference to the American State Papers, Foreign Relations, vol. 2, pages 119, 120, it will be seen by a report of the Secretary of State of the 16th February, 1798, laid before the House of Representatives, that *interest* was awarded and paid on such of these claims as had been submitted to the award of Sir Wiliam Scott and Sir John

Nicholl, as it was in all cases by the board of commissioners. In consequence of some difference of opinion between the members of this commission, their proceedings were suspended until 1802, when a convention was concluded between the two governments, and the commission reassembled, and then a question arose as to the allowance of *interest* on the claims *during the suspension*. This the American commissioners claimed ; and though it was at first resisted by the British commissioners, yet it was finally yielded, and interest was allowed and paid.—(See Mr. King's three letters to the Secretary of State, 25th March, 1803, 23d April, 1803, and 30th April, 1803; American State Papers, Foreign Relations, vol. 2, pages 387 and 388.)

Another case in which this principle was involved arose under the treaty of the 27th October, 1795, with Spain ; by the 21st article of which, "in order to terminate all differences on account of *the losses* sustained by citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of his Catholic Majesty during the late war between Spain and France, it is agreed that all such cases shall be referred to the final decision of commissioners, to be appointed in the following manner," &c. &c. The commissioners were to be chosen, one by the United States, one by Spain, and the two were to choose a third, and the award of the commissioners, or any two of them, was to be final, and the Spanish government to pay the amount in specie.

This commission awarded *interest* as part of the damages.—(Vide American State Papers, vol. 2, Foreign Relations, page 283.) So in the case of claims of American citizens against Brazil, settled by Mr. Tudor, United States minister, interest was claimed and allowed.—(Vide Ex. Doc., 1st session 25th Congress, House of Representatives, Doc. 32, page 249.)

Again : in the convention with Mexico of the 11th April, 1839, by which provision was made by Mexico for the payment of claims of American citizens for injuries to persons and property by the Mexican authorities, a mixed commission was provided for, and this commission allowed *interest* in all cases.—(See communication of the President to the House of Representatives, including the report of the commissioners, under date of 25th August, 1842. Ex. Doc. House of Representatives, 2d session of 27th Congress, vol. 5, Doc. 291.)

So, also, under the late treaty with Mexico of 2d February, 1848. The board of commissioners for the adjustment of claims under that treaty, which lately sat at Washington, allowed *interest*, in all cases, for property lost, from the origin of the claim until the day when the commission expired.

Other cases might be shown in which the United States, or their authorized diplomatic agents, have claimed *interest* in such cases, or where it has been paid in whole or in part.—(See Mr. Russell's letter to the Count de Engstien of 5th October, 1818 ; American State Papers, vol. 4, Foreign Relations, p. 639, and proceedings under the convention with the Two Sicilies, of October, 1832 ; Elliott's Dip. Code, p. 625.) But I think it can hardly be necessary to pursue this subject further in order to show the practice of our govenment with foreign nations, or with claimants under treaties.

The rule of the common law on this point is the same as that already laid down as the rule of the public or national law.

In the case of Conard against the Pacific Insurance Company, it was stated by Judge Baldwin that, in actions of trespass or for torts, "the general rule of damage is the value of the property taken, with *interest* from the time of taking down to the time of trial. This is generally considered as legal compensation which refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated."—(See 6 Peters, 273, and also 282, where the Supreme Court affirm the correctness of this rule.)

Sedgwick, on the measure of damages, (pp. 549 and 550,) says: "When trespass is brought for personal property, and no circumstances of aggravation are shown, the value of the property, *with interest*, furnishes the measure of damages."

In all cases of injury to property, whatever may be the form of the action, the rule that "the value of the property at the time of the injury, *with interest* thereon from that time, is the measure of damages," is of universal application; and in various cases of trespass, trover, case, replevin, &c., this rule is abundantly supported by the following authorities:

Wilson *vs.* Conine, 2 Johnson's Rep., p. 280.
2d Greenleaf's Evidence, p. 282, and cases there cited:
Particularly 14 Pickering, pp. 356 and 361.
14 Johns. 273; 15 ditto, 198–206.
Sedgwick on Damages, 517.
17 Pickering, p. 1; 21 ditto, p. 559.
7 Monroe, 209; 1 Metcalf, 172.
2 Hill, 132; 3 Bibb, 92.
7 Metcalf, 354; 3 Little, 25.
Also, United States Digest, p. 510, and Brannin *vs.* Johnson, 19 Maine Rep., 361.
Bissell *vs.* Hopkins, 4 Cowen, 52.
Hyde *vs.* Stone, 7 Wendell, 354.
Dellenbuch *vs.* Jerome, 7 Cowen, 294.
Also, 7 Porter's Alabama Rep., 481.
15 Connecticut Rep., 302.

In fact, this principal must be so familiar to every common law lawyer that it is perhaps hardly necessary to cite any authorities, much less to accumulate them, which might easily be done almost *ad infinitum*. I will only add two more citations, drawn from the civil law, to show that "fruits or profits were awarded in cases of wrongful taking or detention of property," as part of the damages, by Justinian.—(See liber 22, di rei vind.; liber 17; Cod. lib. 3, c. De Condit ex leg. Also, Domat. vol. 1, lib. 3, tit. 5.)

In the course of the argument my attention was called to the well-known letter from Mr. Jefferson to Mr. Hammond, the British minister, of 29th May, 1792.—(American State Papers, vol. 1; Foreign Relations, vol. 1, pp. 201, 213, 214.) That very able disquisition on the subject of *interest* is confined entirely to the question of inter-

est on debts, or money demands, and when and under what circumstances it may or ought to be allowed or disallowed in such cases; and hence it furnishes no clear rule in respect to the allowance of interest as a measure of damages in cases of *tort*, or in redress of injuries, or as a compensation for the loss of the use, or of the profits of the property illegally taken. At all events, there is nothing in the reasoning or arguments of that paper which in any respect militates against the positions above taken.

This controversy between Mr. Jefferson and Mr. Hammond was finally settled by the sixth article of the treaty of 1794, as will be seen by a reference to that article, in which this government certainly do not deny the propriety of the interest.

But it is said "*the government never pays interest.*" It will readily be admitted that there is no statute law to sustain this position. The idea has grown up from the custom and usage of the accounting officers and departments refusing to allow interest generally in their accounts with disbursing officers and in the settlement of unliquidated *domestic* claims arising out of dealings and transactions with the government. It can hardly be pretended, however, that this usage or custom is sufficiently "reasonable," well known, and "certain," to give it the force and effect of law, and to override and trample under foot the law of nations, the municipal law of the country, and also the well settled practice of the government itself in its intercourse with other nations. This would, indeed, be giving most potent effect to departmental usage.

That the usage or practice of any particular executive department of a government cannot be sustained (however ancient it may be) when against the well settled principles of law, (see 3d Burrows' Rep., 1767.) "When the law is clear, usage cannot control it."—(2d Cowen, 707; New York Firemen's Insurance Company *vs.* Ely; and 16 Johnson, 374.)

Now, if by the law of nations and all other laws, it is clear that the United States are bound to pay interest as a part of the damages in these cases, as I think I have shown that it is, certainly no practice or usage of the Treasury Department can relieve them from that obligation.

But the assertion that the "government never pays interest" is not founded in fact. There is no such inflexible usage or custom in the broad sense in which it is generally understood or stated. The government is just as much bound to do equal and exact justice to all as an individual would be; and they not only do pay *interest*, but have done it in many domestic cases of a character similar to these claims, and that, too, under the advice and approval of the law officers of the government.

In the case of Major Tharp, referred to the Attorney General for his opinion, the present Chief Justice, (then Attorney General) says: "I am not aware of any statute of the United States that forbids the Secretary of War or the accounting officers to allow interest to a claimant if it should appear that interest is justly due to him. As the United States are always ready to pay when a claim is presented, supported by proper vouchers, it can rarely, if ever, happen that they

are justly chargeable with interest, because it is the fault of the claimant if he delays presenting his claim, and does not bring forward the proper vouchers to prove it and justify its payment. But in Major Tharp's case, or any other, if the Secretary of War, upon a review of the whole evidence, should be of the opinion that interest is justly due to the claimant, I think he may legally allow it."—(Opinions of Attorneys General, 1841.)

Here we have the whole length and breadth of the rule, and the reasons of it. But if any such rule or practice or usage had acquired the force or dignity of a "*custom*" or law, the then Attorney General could not with propriety have said that the Secretary might "*legally allow interest*" in any case; if the rule was inflexible—if it was *law*, the Secretary could not depart from it.

In the case of O'Sullivan, the direct question arose, whether the party claimant was entitled to an allowance for the loss of the use of his property, in addition to the value of the property itself. The property was a vessel, and the claim was for demurrage, being much more than the legal rate of interest on the value of the property. The Attorney General (vide Opinions of Attorneys General, p. 1815) decided that it was allowable; and it is understood that it was allowed and paid at the Treasury Department as a part of the "*actual loss.*"

In the case of Sibbald, an act of Congress provided that he should be paid the "*actual damages*" which he had suffered by injuries to his property; and in this case interest was allowed under the opinion of Attorney General Nelson, of 30th September, 1844.

In the case of George Fisher, an act of Congress gave him a "full and fair indemnity" for certain "losses and injuries" suffered by him. In this case *interest* was allowed, with the sanction of the Attorney General.

But I forbear to pursue this point any further. If enough has not already been shown to establish the propriety and justice, as well as the legality, of allowing *interest* in these cases, I should despair of doing so either by argument or authority. If "Moses and the Prophets" were not sufficient for the unbeliever of olden time, so neither would a more lucid exposition or a greater array of authority tend to convince one who doubts upon this point.

It remains for me now to notice more particularly some of the other points and arguments of the respective counsel on the hearing of this case. The paper hereto annexed (marked A) shows the points submitted by the district attorney on behalf of the United States. He also made some objections to the admissibility of evidence and other minor objections of that character, which were settled as they arose in the course of the argument, and which it is not deemed necessary to advert to more particularly.

On the part of the claimant, his counsel also made certain points, which are substantially stated in the paper hereto annexed, (marked B.)

It will be perceived by a reference to these "*points*" of the respective parties, that the true construction of the last clause of the 9th article of the treaty, and of the laws of Congress of 1823 and 1834, to carry it into effect, as well as the character of the decisions in these cases, whether judicial or otherwise, and the effect of the

awards, were drawn in question by both parties, and made the subject of elaborate argument.

As the judge is required to adjudicate these cases according to the provisions of the treaty it is, no doubt, very proper to inquire and ascertain the true construction of those provisions as well as of the acts of Congress to carry it into effect. But it may well be doubted whether some of the questions above alluded to are necessarily or legitimately questions for my consideration, and to what extent I am called upon to give any decision in respect to them. And so far as they do not relate to the appropriate action of the judge, under the treaty and the laws, I do not intend and shall not be understood, I trust, as attempting to give any *authoritative decision* upon them. But as they are so interwoven with each other that it is difficult to separate them, and as both parties have pressed them strongly upon my attention, and both parties (the district attorney on behalf of the United States, as well as the council for the claimant) have particularly requested my opinion on *all* the points argued, I proceed to state, so far as it relates to the main questions arising out of those points, my conclusions or opinion, although in some respects they are different from my former preconceived views.

I have already remarked that I consider this clause of the 9th article of the treaty as the paramount law of the case, and the acts of Congress of 1823 and 1834 as auxiliary or subsidiary to the treaty, and intended to carry its provisions into effect. The mode provided by the treaty of establishing the amount of the claim in each of these cases, or of ascertaining the sum to be paid, is a novel and unusual one for such claims, and, so far as I am aware, is not found in any other treaty, or adopted in any similar case. Usually a board of commissioners is provided for the adjustment of such claims; but in this case the treaty provides that the United States shall pay or make satisfaction for such injuries to individuals as "*shall be established by process of law.*" It is not to be presumed that the able diplomatist who, on the part of the United States, negotiated this treaty, and well understood the import of words, used this term at random, and without some definite intent; nor that the Spanish minister's attention was not called to this extraordinary mode of adjusting claims under a treaty, and that he did not well understand its effect. If this phrase, or term, is one not known to the law of nations, or one which, by the public law, has no particular meaning or construction attached to it, we must, of necessity, look to the common law, or the municipal laws of our own country or Spain, or wherever the term may be found, for the true construction of it. The term is one which is used in the Constitution of the United States, and, either in the same language or substance, in the constitutions of many of the States, and one which is familiar both in this country and England, and well known to the common law; and, as a "term of art," Grotius says, recourse must be had to those most experienced in that art for explanation.—(See Campbell's Grotius, vol. 2, chap. 16, on the Interpretation of Treaties, sec. 3. Also Vattel, book 2, chap. 17, sec. 276; and same principle in Dwarris on Statutes, p. 702; and Puffendorff, book 5, chap. 12, sec. 4.) And again, Vattel says that "attention ought principally to

be paid to the words of the promising party," and those words should of course have their full effect as he understood them.—(Vattel, book 2, chap. 17, sec. 267. Also, vide sec. 268, &c. Also, Kent, vol. 1, p. 174; and Wheaton's Int. Law, p. 334, sec. 17; and particularly the United States *vs.* Jones, 3 Wash. C. C. Rep. 209, and at 215.)

Looking, then, at the sources from which we must of necessity derive the true construction of this term, we see at once that "process of law" must of necessity mean nothing short of judicial proceedings. Judge Tucker says that "due process of law" must be had before "a judicial court or *judicial magistrate.*"—(Vide Tucker's Com., vol. 1, Appendix, p. 203.)

Chancellor Kent (Com., vol. 2, p. 13, 6 edition, and note *b*) says: "The better and larger definition of 'due process of law,' is, that it means law in its regular course of administration through courts of justice."—(See, also, Story's Com. on the Constitution, vol. 3, pp. 660 and 661, and Baldwin's Views of the Constitution, p. 137.)

In 4th Hill's Rep., p. 146, the Supreme Court of New York says that the words "cannot mean less than a prosecution or suit instituted according to prescribed forms for ascertaining guilt or determining title to property."—(See, also, 2d Coke's Inst., p. 50, and 19 Wendell, 676.)

To establish a thing by "process of law," then, necessarily requires a hearing, trial, and judgment, before some judicial tribunal or magistrate, and the proceedings and judgment, or decision, must of necessity possess all the elements and attributes of a judicial proceeding, provided they are conducted by "due process of law."

If this position is correct—and after the most mature deliberation I think it is—then it follows, as a necessary corollary from the premises, that the awards in these cases were judicial decisions, and possess the ordinary attributes or effect of judicial judgments, and necessarily final and conclusive, unless appealed from by appeal to some superior *judicial* tribunal authorized to re-examine and revise them.

But it is said that a direct supervisory or appellate power over the awards of the judge in these cases is given by the 2d section of the act of Congress of 1823, to the Secretary of the Treasury, and that he is authorized by that act to alter, revise, and modify them as in his opinion may be just.

The first answer to this is, that if the position above assumed be correct, and if the awards are *judicial* decisions, no such power can rightfully be given to the Secretary. The power to revise or reform the judgments or decisions of any court or judge acting judicially, can only be conferred on other courts, or on some judicial tribunal, and cannot constitutionally be lodged in the Secretary of the Treasury, or any other executive officer; and in so far as the act makes any such provision, it would be unconstitutional and void.—(Vide 1st Wheaton, 304 and 380, Martin *vs.* Hunter.)

But the more proper view of this point, and a more easy solution of this apparent difficulty, is, I apprehend, that no such appellate power is given to the Secretary, and that such is not the true construction of the act of Congress.

The treaty, it should be borne in mind, provides that these injuries

should be established by *process of law, i. e.*, judicially established, as is above assumed; and the obligation of the treaty, as to the *mode* of establishing them, is equally obligatory upon the nation, as is the duty of having them established and paid; and Congress could not (or perhaps I may better say *ought* not) to make any law which should provide another and different mode not contemplated by the treaty and in direct violation of it. I have no doubt that Congress might, *for a good cause*, annul the whole treaty, or declare that some particular article of it should not be observed, (which would of necessity annul the whole.) Every nation, of course, possesses the power of determining for itself the propriety and expediency of renouncing treaties—and this nation no less than any other—(and they have exercised it, vide 1st vol. Stat. at Large, p. 518.) This is a necessary attribute of sovereignty; and if Congress should pass any such law or joint resolution, the courts of the country would, of course, be bound by the political action of the government in that respect, and would no longer consider such a treaty as the "supreme law of the land." But no such question arises here; Congress have not attempted to do any such thing; on the contrary, every act which they have passed on this subject has been professedly with a view and *bona fide* intent to carry out the treaty. The act of 1823 is entitled, on the face of it, "An act *to carry into* effect the 9th article of the treaty," &c., &c. And it is the clear duty of the judicial and executive departments of the government, in giving a construction to these acts, to so construe them, if possible, as to carry into effect the *intention* of the legislative power, and at the same time, if there is any apparent conflict between the acts and the treaty, to give that interpretation to them (if it can be done) which will make them harmonize with the treaty, and render them consistent with the treaty and each other; and above all, not to give them such a construction as would virtually nullify the acts themselves, and render the provisions of the treaty or the laws themselves useless or nugatory.

Authorities are hardly necessary, I apprehend, to sustain this proposition: but I will refer to the following: 2d Cranch, 64, or 1st Cond. Rep., 358 and 362. Also, Mr. Wirt's opinion, already quoted, pp. 568 and 569; Dwarris on Stat., p. 690; Pennington *vs.* Cox, 2d Cranch, 23, or 1st Cond. Rep., 346.) Let us see, then, whether a construction can properly be given to these acts which shall be entirely consistent with the treaty. And first, let it be be borne in mind, that the first section of the act of 1823 directs that these claims shall be adjusted (adjudged) "agreeably to the provisions of the 9th article of the treaty with Spain." (The word "*adjust*" is used in the 1st section, and "*adjudged*" in the 2d section; hence they may properly be considered as synonymous terms, or intended so to be in this act.) The manifest intent of this provision of the act of 1823 is, that the treaty should be the supreme or governing law of the case; and as that directed, so it should be. Hence, if it is the fair intendment of the treaty that these claims should be *judicially* established, then the law provides likewise for the same thing, so far as the first section of this act is concerned.

Is there anything, then, in the second section of this act, or the

act of 1834, which militates against this position, or which clashes with this view of the case, or with the provisions of the treaty? The second section of this act provides that the judge shall report his decisions *when in favor of the claimant*, with the evidence on which they are founded, to the Secretary of the Treasury, "who, on being satisfied that the same is just and equitable within the provisions of the treaty, shall pay the amount thereof," &c. And in the first section of the act of 1834, there are the further provisos to the Secretary's power to pay, "that no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government," and, also, "that no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States." And as these provisoes were, by the second section of the same act, made obligatory upon the judge, who was only authorized to adjudicate and decide these claims of 1812 and 1813, subject to these provisoes, and also subject to the further provision that the "claims should be presented to the judge within one year from the passage of this act," it follows, of course, that they were equally obligatory upon the Secretary, for he could only pay such as the law authorized the judge to award. Here, then, it would seem, was ample scope for the exercise of that supervisorypower which is confided to the Secretary by the provision first above quoted, without interfering with the *amount* of the decree or award, or infringing any provision of the treaty or constitutional law.

When a record in one of these cases was presented, it became the duty of the Secretary to examine and ascertain, 1st, whether the injury in question had been occasioned by the operations of the American army in Florida.

2d. That it had been suffered by a Spanish officer, or individual Spanish inhabitant, or (under the provision of the law of 1834) "actual Spanish subject."

3d. That it had been established by process of law.

4th. (If it was a loss of 1812 and 1813) that it had occurred or been committed previous to the entrance into Florida of the agent and troops of the United States in 1812.

5th. That the claim (if for losses of 1812 and 1813) had been filed and presented to the judge within one year from the passage of the act of 1834.

All this the secretary might rightfully and properly do under the law; and all this in fact amounted to no more than an ascertainment on his part, that the case presented for payment was justly and equitably within the provisions of the treaty—which I apprehend is synonymous with "just and equitable, within the provisions of the treaty." The law in effect requires the Secretary, before paying, to see that it was a treaty case, and one in which the judge had jurisdiction; and provided he was satisfied on those points, then to pay "the amount thereof."

The difference in principle between the right and authority to inquire into the jurisdiction or power of a judicial tribunal to pronounce any decree or award, or to render the judgment in question, and the *appellate* power to supervise such decision or judgment, and reform

or amend it, in whole or in part, is a difference or distinction too familiar to require comment. Any person upon whom a judgment or decision may operate, or who may be called upon to conform to, or execute it, either officially or otherwise, may rightfully exercise the authority first mentioned, and may inquire whether the court or judge had jurisdiction to render the judgment.

In these cases, the jurisdiction of the Florida judges was a limited and special jurisdiction, expressly conferred by the act of Congress, and could not be exceeded or enlarged, but must be strictly pursued in order to give validity to their awards. And although they are directed to adjudicate these claims "*agreeably* to the provisions of the treaty," yet they derive their sole power and authority from the acts of Congress, and must act strictly within the powers and jurisdiction conferred, in order to make their decisions of any binding force or validity, and especially in order to authorize the Secretary to pay them.

Their authority and jurisdiction depended upon the existence of certain facts which must necessarily be shown by the record and the evidence in the case; and hence there was peculiar propriety that the act should direct the Secretary to examine and see whether the awards were just and equitable within the provisions of the treaty, which is, as I have already remarked, the same thing, in substance, as justly and equitably or fairly within the provisions of the treaty, and amounts, in substance, to an authorization to the Secretary to inquire and ascertain whether the case was within the jurisdiction of the judge, and one in which the law authorized him to make an award; and for this purpose it was provided that the judge should not only report his decision to the Secretary, but also the evidence on which it was founded, in order that the Secretary might see that the party claimant was a Spanish officer or inhabitant or subject, and whether the injuries for which payment was claimed were, in fact, injuries occasioned by the operations of the American troops; and, in short, whether the case was one in all respects within the provisions of the treaty and the acts of Congress, and one which the judge was *authorized* to *adjudicate*. And all this authority might well be conferred upon the Secretary without, in any respect, conflicting with that obligation of the treaty which requires these injuries to be judicially established, or established by process of law.

And, perhaps, it is not unworthy of remark, that the law requires of the Secretary, in case he is satisfied that the award is just, "to pay *the amount* thereof;" not such *part* or *portion* as he may deem just or equitable, but the "*amount* thereof;" which certainly very strongly favors the idea that Congress did not intend that the Secretary should interfere with the integrity of the award, or alter or reduce the amount of it. And, also, it may be asked, if Congress intended to give to the Secretary a general supervisory or appellate power over the action of the judge, why confine it to those cases only wherein the judge decided in favor of the claimant? Why not also give to the claimant, as well as the government, the benefit of this appellate power?

I should not have dwelt so long, nor at all, upon this point, (which may, perhaps, be considered more properly a question for the Secretary of the Treasury than for the judge,) had I not deemed it necessary in order to elucidate my views, as above stated, of the true construction

of the last clause of the 9th article of the treaty, and to show, as I have endeavored, and I trust somewhat satisfactorily, that the obligations of the treaty to have these injuries "established by process of law" is not at all impaired by the acts; and that by the true construction of the acts of Congress, there is no conflict between them and the treaty; but that, on the contrary, they may be, and ought to be, so construed as to harmonize with the treaty and with the principle first laid down, that the awards or decisions are judicial in their character.

I am not only well aware that a different view of this subject has been entertained by those for whose opinions I should have great deference, but I have myself formerly had a different view of the subject, and entertained a contrary opinion as to the judicial character of these decisions, and the nature and character of the powers and duties conferred upon the judges; but the very elaborate arguments of this question, which have been had before me, in this case, and an examination of numerous authorities, as well as of very able opinions of some of the most distinguished lawyers in the Union, have led me to examine this subject with much care and deliberation, and my examination and reflection have forced me to the conclusions above stated.

There is, however, another fact or circumstance which has had great influence on my mind in producing the conclusions which are above stated, and to which my attention was more distinctly called by a paragraph in a recent very able opinion of the present Attorney General of the United States, a copy of which, referred to in the argument, was laid before me by the district attorney.

If the power to adjudicate these cases which is conferred upon the judges by the acts of 1823 and 1834, is not *judicial* in its character, and to be exercised judicially, then it follows, of course, that a kind of nondescript tribunal is created by these acts for the adjudication of these cases, consisting of the judge and Secretary together, or of the judge alone, with a supervisory or appellate power in the Secretary, and that they act as, or in lieu of, a board of commissioners; or that the judge acts as a *quasi* commissioner, subject to the supervisory power of the Secretary. However this may be, or in whatever light it may be viewed, it is clear either that Congress conferred the power of adjudicating these cases as a judicial power, and to be exercised judicially, or they have established a separate and distinct tribunal for that purpose, consisting of the judge and Secretary, and have appointed the officers or members of that tribunal by act of Congress, which designated them in the act, not by name, but by their style of office. This would be a clear violation of the Constitution, (art. 2, sec. 2,) which provides that the President shall nominate, and, with the consent of the Senate, appoint all officers of the United States of every description, except certain inferior officers mentioned in that section; but this is not a case within the exception. Here, then, is a dilemma, from which I see no escape except by that construction of the acts of 1823 and 1834 which is above assumed.

It cannot be contended that the duty of adjudicating or awarding upon these claims was not an *office*, and one of high trust and responsibility; if it was, it could be created only in the constitutional way; it *could not* be conferred by act of Congress on any person by name or

by his style of office; and, moreover, though additional duties of this kind might perhaps be rightfully imposed upon executive or administrative officers, yet it is clear that they could not be forced upon a judicial officer unless they were of a judicial character. It is a well settled principle, that Congress cannot by law impose upon a judicial officer any duties except such as are of a judicial character, and to be performed *judicially*.—(*Vide* 3 Story's Com. on Const., p. 651, sec. 1771, and cases there cited. Also, American State Papers, vol. 20, pp. 49, 50, and 51, Misc. vol. 1.)

Now, we must either come to the conclusion that Congress considered the duty and authority conferred upon the Florida judges by these acts to be of a judicial character, and to be exercised judicially, and that they so intended to confer it by the acts in question, and thus adopt the construction which I have assumed as the correct one; or we must conclude that Congress disregarded the principle last above stated, which had been well settled by the courts; and, moreover, that they violated the Constitution, and that the acts are nugatory.

Chief Justice Marshall says, that "where rights are infringed; where fundamental principles are overthrown; where the general system of the laws is departed from, the intention of the legislature must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." And again: "that the consequences *are* to be considered in expounding laws where the intent is doubtful, is a principle not to be controverted."—(*Vide* United States *vs.* Fisher, 2 Cranch, 358, or 1 Cond. Rep., 425.) So also in Dwarris on Statutes, page 755, it is said that the consequences *are* to be considered, and that "the courts will not so construe statutes as to admit of absurd consequences."—(See also Paine's C. C. Rep., p. 11, and also cases already cited herein on the construction of statutes.)

The treaty had already provided that the injuries should be established by process of law—*i. e.*, judicially; and it only remained for Congress to designate the particular judges or tribunal who should adjudicate them; and this they did do by the acts of 1823 and 1834.

And it may not be amiss here to remark, that the judge of the superior court of East Florida, and the court over which he presided, and of which he was the sole judge, possessed the ordinary powers and jurisdiction of a circuit and district court of the United States, as does the present district court, and as such, was authorized to take cognizance of questions arising under the laws and treaties of the United States; and being established in the vicinage of these *injuries*, was a peculiarly appropriate tribunal to take cognizance of these cases.

It is difficult to conceive a case wherein the rules which I have before adverted to in respect to the construction of acts of Congress seem to be more applicable than in the case now presented. The construction, on the one hand, that the judge acted solely as a commissioner, and not judicially, would, it is believed, be equivalent to declaring the two acts of Congress of 1823 and 1834 unconstitutional and void, and at all events a violation of the provisions of the treaty, and in direct disregard of constitutional principles, as decided by the Supreme Court; while, on the other hand, if we adopt the construction contended for by the claimants, the acts will be consistent with each other, will harmonize with the treaty and the Constitution, and the manifest and

apparent intent of the laws will be carried out, and no violence done either to the letter or spirit of the laws.

I have already remarked, in a previous part of this opinion, that it was strongly urged upon me, in the argument by the district attorney, that the decisions of the Secretary of the Treasury, in regard to the allowance of interest in these cases, was to be considered by me as the ruling of an appellate tribunal, and binding upon me as law or precedent; and I also stated, in part, my views on that subject, and why I had not deferred to the Secretary's opinion. I will only add, that if I am right in the construction which I have, in the foregoing pages, put upon the acts of Congress in question, and in the views which I have taken, it necessarily follows that the Secretary had no such re-revising power whatever, and that his decision or omission to pay the interest ought not in any respect to control my opinions or judgments.

I have now, I believe, in the course of this opinion, disposed of every point of any moment which has been raised by the respective parties. I regret that I have not been able to present my views and conclusions in a more condensed form, and with greater brevity; but the great variety and importance of the points raised, as well as the magnitude of the question from the amount involved in the general principle, must be my apology, if any is necessary, for so much detail.

It only remains for me to add, that, on pronouncing this decision, the district attorney prayed an appeal, and requested that that fact might be noted by me herein, to the end that he might, if the laws allowed it, prosecute such appeal if instructed to do so.

J. H. BRONSON,
Judge of the district court of the United States for the northern district of Florida.

The foregoing is a true copy from the original opinion.

J. H. BRONSON,
Judge, &c., &c.

Opinion of the honorable Daniel Webster on the Florida claims arising under the ninth article of the treaty of 1819 *between the United States and Spain.*

The questions propounded by Mr. Secretary Walker, upon which the following opinion of Mr. Webster was given, are as follows:

1. "Whether the provisions of the treaty require the losses or injuries for which satisfaction is provided to be established judicially; and if so, whether decrees of the judges as to the amount or extent of said losses or injuries—as to cases within the provisions of the treaty—are final?

2. "Whether the measure or rate of satisfaction adopted and applied by the judges in these cases, namely, to add to the value of the property, at the time of its loss, interest as a compensation for the loss or deprivation of its use, is or is not in accordance with the laws and usages of nations as the proper rule of redress for such injuries, and can be allowed and paid by this department under the acts of Congress applicable to this subject?"

OPINION.

It appears to me that great misconception has prevailed respecting the true construction of the ninth article of the treaty with Spain of 1819, and of the two acts of Congress passed for the purpose of carrying the provisions of that article into effect.

Before the date of the treaty, and while Florida yet belonged to Spain, that is to say, in the years 1812, 1813, and 1818, inroads were made in Florida by certain troops of the United States, and injuries and excesses committed on the inhabitants.

Although Spain was now about to cede the whole Territory to the United States, yet her government felt it to be its duty to cause a stipulation to be contained in the treaty of cession providing satisfaction for these injuries, and full indemnification for the sufferers.

Instead of a joint commission, or mutual arbitration, to ascertain these injuries, and adjudge the proper compensation, the contracting parties agreed that this duty should be performed by a judicial tribunal. There was good reason for this. The injuries were local. They were committed on the property, real and personal, of the inhabitants. The parties were all in Florida, and the proofs all in Florida. Judicial courts were now about to be established in Florida under the authority of the United States; and nothing could be more just or expedient than that to these courts, sitting in the Territory, should be assigned the duty of inquiring into these cases, and establishing the right and the amount of indemnification where such right was proved. The ninth article of the treaty provided, therefore, that—

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

At the commencement of any discussion of the questions arising in this case, some propositions must be received and admitted as undoubted truths.

I. The first is, that a treaty is the supreme law of the land. It can neither be limited, nor restrained, nor modified, nor altered. It stands on the ground of national contract, and is declared by the Constitution to be the supreme law of the land; and this gives it a character higher than any act of ordinary legislation. It enjoys an immunity from the operation and effects of all such legislation.

From this acknowledged truth there results a rule of construction of very great importance, and which is to be applied to all laws passed for the professed purpose of carrying treaty stipulations into effect, and that is, that such laws must be so construed as to conform to the provisions of the treaty, and give them full effect, and not so as to thwart those provisions and embarrass their operation and application by imposing new limitations or conditions, or by any other means. The advantages secured by a treaty stipulation to those for whose benefit it was entered into cannot be abridged or curtailed by any law passed for executing the treaty. The treaty and the law must be made to stand together, where they can, and so far as they can; and if, after all, there be found an irreconcilable inconsistency, the law must give way to the treaty.

II. A second general proposition, equally certain and well established, is, that the terms and the language used in a treaty are always to be interpreted according to the laws of nations, and not according to any municipal code. This rule is of universal application. When two nations speak to each other, they use the language of nations. Their intercourse is regulated, and their mutual agreements and obligations are to be interpreted by that code only, which we usually denominate the public law of the world. This public law is not one thing at Rome, another at London, and a third at Washington. It is the same in all civilized states, everywhere speaking with the same voice and the same authority.

Guided by these elementary rules, let us examine the treaty and the laws.

The words of the treaty are plain: "The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

The terms "process of law" are the terms usually employed to describe judicial proceedings. They are exactly equivalent to the phrase "due course of law," or judgment of law.

They imply parties, a case, a hearing, a trial, and a judgment or decision. This is their interpretation in every book of authority from Magna Charta down; and it is precisely the sense in which the words are used in the fifth article of the amendments to the Constitution of the United States. In that article it is declared that "no person shall be deprived of life, liberty, or property, without due process of law"—that is, without hearing, trial, and regular judgment.

"Process of law," as the words are used in the treaty, mean any kind of judicial proceedings suited to the case. It may be common law process, equity process, or admiralty process, as the case may require. But whatever be the particular form of the proceeding, it must be a judicial proceeding; a proceeding which involves a hearing, a trial, and a judgment.

The treaty acknowledges that there are, or may be, persons who have suffered injuries by the operations of the American army in Florida; and it promises satisfaction to all such persons when those injuries shall have been established by process of law.

To establish an injury by process of law, is to prove that injury before some competent judicial tribunal; to cause its character and its amount to be ascertained and fixed, and judgment thereon pronounced and declared. And this judgment, supposing it always to be rendered by a judicial tribunal acting within its jurisdiction, cannot be vacated, annulled, reversed, or altered, except by some higher appellate power, itself proceeding, also, by due process of law.

Two consequences follow from these premises:

I. No one can claim any compensation or satisfaction under this clause of the treaty who cannot establish the fact of an injury, and fix its amount, by regular judicial proceeding and judgment.

II. Any one who has established the fact of an injury, and the just measure of satisfaction, by regular legal proceedings and judgment, cannot be deprived of that satisfaction, or any part of it, by

the superinduced authority of a mere executive officer or political functionary.

That would be in the very teeth of the treaty. It might just as well be said, that under this clause an executive officer, or a political functionary, might be authorized to decide on the case of an alleged injury, and the satisfaction justly due, if any, originally, and in the first instance, without any reference whatever to a hearing, trial, or judgment by process of law. For if that which the treaty says shall be "established by process of law" may be enlarged, diminished, changed, or altered by the mere discretion of an individual, then, it is evident, this particular provision of the treaty becomes a dead letter, and the whole clause means no more than that satisfaction shall be made for injuries in any way that the government may see fit to provide; and that all cases may be disposed of by executive agents or officers without hearing, trial, or judgment, if they so see fit; in other words, without "process of law."

The mode of ascertaining and establishing the injury is as much a part of the treaty as the obligation to make satisfaction for it. It is an important, essential, substantial part of the stipulation. It would be no more a violation of good faith on the part of the government of the United States to refuse to make any satisfaction at all, than it would to refuse that particular satisfaction which it has promised by the treaty. The parties in interest have a right to demand that they shall have an opportunity of establishing the injuries done them, and seeking satisfaction for those injuries in the mode expressly stipulated in the treaty; and to reject that mode, and to adopt another, without their consent, would be a flagrant injustice, and an outrage on public faith. All this appears to me to be too plain to require further discussion.

If any authority be required to show the settled meaning of the terms "process of law," reference may be had to 3d Story's Commentaries on the Constitution, sections 1782–'3, pages 660, 661. 2d Kent's Commentaries, 6th edition, pages 12, 13, note b. Baldwin's Views, page 137. Tucker's Blackstone, vol. 1, part 1, appendix, p. 203. Taylor *vs.* Porter and Ford, 4 Hill's New York Reps., p. 140. 19 Wendall's Rep., p. 676.

We come next to consider the acts which have been passed by Congress for carrying this part of the treaty into effect.

The first act was passed on the 3d day of March, 1823; the second on the 26th of June, 1834.

These acts, with their titles, are set forth and recited in the case.

These acts or laws were enacted in *pari materia;* the latter refers to the former, and extends its provisions. They are, therefore, to be considered together, and such a construction, if practicable, given to them as shall produce a harmonious result. And I have already said that they must be so construed as to carry the treaty, in its plain and just sense, into full and complete operation; not so as to modify or alter it; not so as to embarrass and hamper its provisions; not so as to deprive the parties interested in its provisions of any of the advantages or benefits intended for them.

The principal difficulty rises from the second section of the first act, the words of which are—

"That, in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is (are) just and equitable within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged out of any money in the treasury not otherwise appropriated."

According to the case stated, it would appear that, under the supposed authority of this section, the Secretary assumed and exercised a full appellate power over the judgments and decrees of the courts, re-examining the decrees on their general merits, and on the whole evidence, and reducing and altering them, at his own unlimited discretion; and, especially, that he struck out interest, in all cases in which the courts had allowed it, as being no just part of the satisfaction intended by the treaty.

Such a construction of this section as would confer this power on the Secretary of the Treasury cannot be received and enforced, in my judgment, without overturning the plainest principles of constitutional and public law. If the section cannot be made to bear another construction, then it must be wholly rejected, as being inconsistent with the treaty, and therefore repugnant to the Constitution of the United States.

By the treaty, the injury of the suffering party is to be *established* by process of law. It is absurd to say that this provision would be satisfied by a decision of the Secretary of the Treasury. Such a decision is no process of law.

But there is a construction which may be given to this second section, without violence, which will make it sensible, proper, and quite consistent with that clause of the treaty which it was the object of the whole act to carry into effect.

The courts before whom these claims were brought were courts of limited jurisdiction. They were courts, they were judicial tribunals; their proceedings were by process of law. Nevertheless, they were tribunals of a specific and limited, and not of a general jurisdiction.

The act of Congress declared in the first section—

"That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and *adjust* all claims arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States."

I may remark, in passing, that the word "adjust" in this section is either a clerical error for "adjudge," or, if the word were really "adjust," the meaning evidently was the same as "adjudge;" because, in the following section, the act says that the Secretary of the Treasury, on being satisfied, &c., shall pay the amount thereof to the person or persons in whose favor the same is "*adjudged.*"

I may remark further, that it is quite frivolous to contend that the treaty required a judicial trial only for the purpose of proving the fact of injury, and that the amount of satisfaction may still be left to be fixed by an executive officer. To establish an injury, or wrong, done by one party and suffered by another, by process of law, is to ascer-

tain and fix the amount of the injury, as well as the fact of its having been committed. No other sense can be given to the word; and so Congress understood it, for the law provides that the courts shall receive and adjust (adjudge) the claims, and decide thereon, and that the *amount* by them *adjudged*, the Secretary of the Treasury being satisfied, &c., shall be paid out of any money in the treasury not otherwise appropriated; so that the whole question comes again to this: What is the extent of authority which the second section of the act gave, or could give, to the Secretary of the Treasury over the decrees or judgments of the courts?

These courts, as I have said, were courts of limited jurisdiction; but, like other such courts, they must judge for themselves, in the first instance, of the extent of their own jurisdiction. When a case is brought before them, they must decide whether it is a case to which their authority extends; and as they decide this necessarily preliminary question, so they will, or will not, proceed to hear and decide the cause.

But their decision on the extent of their own jurisdiction may be inquired into and examined: first, by a court of appellate jurisdiction, if any such be established by law; second, by any party called to act on the case, and whose duty it is to carry all lawful decisions of the court into execution. In such a case it is evident that the party acts at his peril, and he can judge of nothing but the very question of jurisdiction.

If a sheriff be called on to serve process, he may, for his own safety, inquire whether the court from which the process issued had jurisdiction in the case, so as that he will be justified in obeying its orders; but he cannot inquire into the correctness of the judgment on which the process issued. So, if an officer be required to collect a tax, he must first know, or be able to see, whether the tax has been levied or assessed by competent authority.

If a disbursing officer be required to pay money, he must, in like manner, take care to be satisfied that the authority requiring the payment was competent to make the requisition; but he cannot judge of the merits or demerits of the claim on which the allowance was made, and payment demanded, if it be the case of a private claim, nor of the propriety or impropriety of the decision, if the case be of a public nature. It is enough for him to see that the command comes from lawful authority, and he needs to look no further.

Now, this, I suppose, is the whole authority which the act of Congress intended to give, as it is most clearly all that it could give, to the Secretary of the Treasury in regard to the judgments of these courts. The phraseology, it is true, is not very accurate. The words are, that the Secretary of the Treasury, on being satisfied that the decision of the court is "just and equitable, within the provisions of the treaty," shall pay the amount thereof.

This I understand to mean no more than if the words had been, that the Secretary of the Treasury, on being satisfied that the decision is justly and equitably within the treaty, shall pay the amount.

To be "justly and equitably" within the treaty is to be within the treaty. And if the Secretary of the Treasury finds, on looking at the proceedings, that the case was one within the treaty—that is, that it was the case of an injury committed in Florida, on Spanish officers

or individual Spanish inhabitants, by the army of the United States—then he is to pay the amount adjudged.

This, in my opinion, is the entire extent of his authority of supervision. He has no right whatever to open the judgment, examine the merits of the case, weigh the evidence, and reform the judicial decision. It is preposterous to say that when the Secretary of the Treasury exercises this supposed power, and reverses the judgment of the courts, the injury of the party complaining has been "*established*" by "process of law" according to the solemn stipulations of the treaty.

I see nothing in the second act materially affecting the remarks which I have made on the first. That act had two objects, connected with one subject.

The court in East Florida had allowed certain claims for depredations committed as early as in the years 1812 and 1813, and other claims of the same description were known to exist The Secretary of the Treasury had rejected or reversed all judgments founded on such claims, they not being, in his opinion, within the treaty.

The act of 1834 provides that the amount of the judgments in these cases already rendered should be paid as judgments in other cases; and that claims of this class, not as yet decided and adjudged, should be received, examined, and adjudged, in like maner as the cases arising in 1818, and subject to provisoes which confirm strongly the view I have taken of the first act.

The evident object, and all the object, of the act of 1834 was to place claims for injuries in 1812 and 1813 on the same footing with those for like injuries in 1818.

This act was passed, not as making any new or independent provision for claims, but simply for the purpose of declaring the sense of Congress that the injuries committed in the years 1812 and 1813 are within the treaty, confirming thus the opinion of the court, and reversing that of the Secretary of the Treasury. This point is therefore now settled.

It appears that the Secretary of the Treasury, in the exercise of his supposed or assumed appellate power, struck out interest in all cases in which it formed a part of the amount adjudged by the court. If the opinions already expressed be well founded, the Secretary could lawfully exercise no such power. The courts adopted, and had a right to adopt, their own rule for assessing damages and awarding amounts in the cases before them. If they saw fit to allow interest, it was an exercise of their judicial power with which the Secretary could not interfere.

In such a case, the claim for interest was *established by process of law* as much as the claim for the original injury. It *was res judica.* It had become a judgment of a competent, and the only competent, tribunal ; and the Secretary could not disturb it, by rejecting any part, any more than by overthrowing the whole. But as this is an important question, I propose to consider it on principle, and independent of the judical decision in a particular case.

A vague notion has been prevalent, and the expression of it has often been repeated, that the government of the United States never pays interest. This is not at all correct, in point of fact. Interest has been allowed to claimants by the acts of Congress in almost innumerable instances.

But if such a rule did exist, it would not affect this case in the slightest degree. Nothing more can be understood from any such rule than that in matters of account, or on deferred debts, claims, or demands, the Treasury Department does not allow interest. This proceeds on the presumption that accounts will be promptly rendered, and all claims and debts presented and paid when due.

But in cases such as I am now considering, interest is allowed, not as interest in its ordinary sense, that is to say, as augmentation, running and growing on a fixed sum. It is regarded merely as a part or element in the loss or injury, or as a just mode of fixing the amount of damages.

An individual has suffered a wrong, a loss and injury, inflicted on his property, for which the government is liable, and for which it feels bound to provide him redress. But that redress cannot, in many cases, be instantaneous or immediate. Before it can be possibly obtained in the appointed course, much time is consumed, much personal attention demanded, and often heavy expenses incurred. These are all direct and immediate consequences of the original loss or injury; they form a part of it, and in all justice and equity enhance the just claim for indemnity.

Different tribunals deal with these portions of the loss and injury in different ways, all of them being reasonable in themselves. One thinks it just to make specific allowances for the loss of use of capital, and for time, expenses, and charges; another, as a simpler mode, makes one allowance to cover them all, under the name of interest, and adds this to the amount of the original loss, as proved; a third combines all parts of the compensation together, forms one aggregate, and awards a round sum, or sum in gross for the whole. It is in the discretion of any tribunal, called on to make satisfaction for a loss or an injury, to adopt either of these modes.

But the importance of this question calls on me to go further; and I maintain that it was the bounden duty of the courts to add interest, in these cases, to the original amount of loss proved. They could not escape from this duty without a manifest departure from principle.

We are now construing a treaty, a solemn compact between nations. This compact between nations, this treaty, is to be construed and interpreted throughout its whole length and breadth, in its general provisions, and in all its details, in every phrase, sentence, word, and syllable in it, by the settled rules of the law of nations. No municipal code can touch it, no local municipal law affect it, no practice of an administrative department come near it. Over all its terms, over all its doubts, over all its ambiguities, if it have any, the law of nations "sits arbitress."

The treaty, in this 9th clause, speaks of satisfaction to be made for injuries, and injuries which had been committed by violence, by armed men, acting without right, and without authority. And I maintain that there is, in the code of national law, a fixed and settled rule, founded in reason, and established by the highest authorities, by which satisfaction for such injuries is to be ascertained and adjudged.

This rule is laid down by Rutherforth in these terms:

"In estimating the damages which any one has sustained, when such things as he has a perfect right to are unjustly taken from him,

or withholden, or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits, or profits that might have arisen from it. He who is the owner of the thing, is likewise the owner of such fruits or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself."—(Lib. 1, chap. 17, sec. 5.)

The language of Grotius is:

"The loss or diminution of any one's possessions is not confined to injuries done the substance alone of the property, but includes every thing affecting the produce of it, whether it has been gathered or not. If the owner himself had reaped it, the necessary expense of reaping, or of improving the property to raise a produce, must also be taken into the account of the loss, and form part of the damages."—(Campbell's Grotius, vol. 2, pages 195, 196. Lib. 2, chap. 17, sec. 4.)

In laying down the rule *for the satisfaction of injuries*, in the case of reprisals, in making which the strictest caution is enjoined not to transcend the clearest rules of justice, Mr. Wheaton, in his book on national law, says:

"If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something of the former, and apply it to its own advantage till it obtains payment of what is due, together WITH INTEREST AND DAMAGES."—(Wheaton on International Law, page 341.)

Mr. Wheaton, in the above passage, has copied and hardly varied the text of Vattel.—(Lib. 2, chap. 18, section 342.)

To avoid trouble and detail in ascertaining the actual amount of damages or injury resulting from the loss of the fruit or profit of the thing lost or destroyed, the modern practice of nations, when making compensation for losses and injuries by joint commissions, as well as the daily practice of courts sitting under the law of nations, is to allow interest, at the legal rate, as a compensation for the loss of fruits and profits, as a substitution for an actual and detailed account of such fruits and profits.

[That the prize courts are governed by the laws of nations, see Kent's Com. 5th edition, pages 68, 69, 70; 9 Cranch, 191, 244.]

The Supreme Court of the United States uniformly holds the same doctrine:

"The prime cost or value of the property lost, and, in cases of injury, the diminution in value by reason of the injury, *with interest thereon*, affords the true rule for estimating damages in such cases."—(3 Wheaton, page 546.—The Amiable Nancy.)

See, also, 1 Gallison's, 315, to the same point, case of the Lively.

The rule is exactly the same in the English courts, sitting under the law of nations.—(2 Dodson, page 84)

It now only remains to be added, that the government of the United States, in its intercourse with foreign nations, and in demanding at their hands reparation for injuries, has not only recognized the principle and the rule, as above stated, but has affirmed them with emphasis, and insisted on their application in all cases. It will hardly be thought necessary to go through our whole history to collect *cases to this* point. I content myself with calling attention to one of

the most conspicuous, and which it is quite impossible to distinguish, in point of principle, from the cases provided for in the 9th clause of the treaty of 1819, which I am now considering.

A question arose, under the convention of St. Petersburg, between the United States and Great Britain, respecting property alleged to have been carried away by the British forces, at the close of the last war with England, in contravention of the stipulations contained in the treaty of Ghent. Great Britain admitted the carrying away, but denied that it was any infraction of the treaty. The question in difference was submitted to the arbitration of the Emperor of Russia, and he made an award in these terms:

"The United States of America are entitled to a just indemnification from Great Britain for all private property carried away by the British forces."

For the purpose of carrying this award into effect, a joint commission was instituted to sit at Washington, the American commissioner being Mr. Langdon Cheves, and the British commissioner Mr. George Jackson. They differed on the question of interest. In the end, the matter was compromised, by the payment, on the part of Great Britain, of a gross sum, which was distributed by the Government of the United States, first, in paying off the principal of each claim, and, secondly, for paying interest on the several claims, so far as the residue of the sum received would extend.

The claim of the government of the United States was clearly and ably set forth by the American commissioner, Mr. Cheves; and to avoid length and repetition, I append to this opinion extracts from his remarks.—(See Appendix.)

The treaty between the United States and Mexico, of the 11th of April, 1839, provided for the institution of a joint commission for ascertaining and determining the claims arising from injuries to the persons and property of the citizens of the United States by Mexican authorities.

The 1st and 5th articles of the treaty provided as follows:

ARTICLE 1. "That all claims of citizens of the United States should be referred to a joint board of commissioners, who should be sworn impartially to examine and decide upon said claims."

ARTICLE 5. "That the said commissioners shall, by a report under their hands and seals, decide upon the justice of the said claims, and the amount of compensation, if any, due from the Mexican government in each case."

These articles contain all the provisions of the treaty respecting the duties and powers of the commissioners.

The act of Congress of 12th June, 1840, "to carry into effect" said treaty, provided for the appointment of two commissioners on the part of the United States, who, with two others on the part of Mexico, "shall form a board, whose duty it shall be to receive and examine all claims provided for by the convention, and to decide thereon according to the provisions of the said convention and the principles of justice, equity, and the laws of nations."

The American commissioners, Mr. Marcy and Mr. Rowan, (and afterwards Mr. Marcy and Mr. Breckenridge,) allowed interest (at the same rate as was allowed by the Florida judges in their decrees) in all cases

of injuries arising from loss or destruction of property; and the umpire, Baron Roenne, allowed the interest in all cases. Indeed, it is not understood that the Mexican commissioners objected to such allowance.

I append to this opinion one other paper which contains an opinion of the Attorney General of the United States on a private claim. It is the case of Mrs. O'Sullivan, and may be found at page 1115 of the Opinions of the Attorney General.

The rule of damages, adopted by the courts in Florida, was laid down by Judge Reid, in the first decision awarding interest, in these word, viz:

"I am required by the statute to receive, examine, and *adjudge*, these claims for losses. In performing this duty I have allowed, because it seemed to me just and equitable to allow it, *interest* upon the amount or value of property ascertained to have been lost. The rate of interest existing in the province at that time (1812 and 1813) was five per cent., and this is the sum allowed in all cases. I am sensible that this allowance will swell considerably the amount to be paid to the claimants, but I do not perceive how it could be avoided. If we lose sight of the national character of one of the parties, and suppose two private persons engaged in a dispute about an injury to property, the tribunal to which resort is had, in adjusting the damages due by the one to the other, will consider the value of the property destroyed, in connexion with the time for which the owner has been deprived of the use and enjoyment of his property. The first being ascertained in money, a compensation for the last may best be regulated by reverting to the rate of interest allowed by the law of the country where the wrong was done."

If the opinions which I have expressed, and attempted to support, are sound, and well founded, then this rule, adopted by the courts, is exactly the rule which they were bound to adopt, and the only rule which they could adopt, without manifest disregard of the principles of public law.

It may, probably, be thought that some of the opinions which I have expressed in this paper are more or less in conflict with opinions which have been given, in these cases, by recent Attorneys General of the United States, Mr. Crittenden, Mr. Legaré, and Mr. Nelson. Perhaps, however, the differences may be rather apparent, than real, as the questions appear to have been submitted, and their opinions given, without particular reference to the terms of the treaty, or those authorities of public law, which, in my judgment, rule the case. On the whole, I am prepared to answer the questions proposed to me; and my opinion clearly is:

I. That the provisions of the treaty require the losses or injuries for which satisfaction is provided to be established judicially; and that the decrees of the judges as to the amount or extent of said losses or injuries, as to cases within the treaty, are final.

II. That the measure or rule of satisfaction adopted and applied by the judges, in these cases, namely, to add to the value of the property at the time of its loss interest, as a compensation for the loss or deprivation of its use, or as covering the necessary and immediate consequences of the original injury, is in accordance with the laws and usages of nations, and ought, undoubtedly, to be allowed and paid by the Secretary of the Treasury, under the acts of Congress already cited.

April 6, 1849. DANIEL WEBSTER.

APPENDIX.

Extracts from the remarks of the American Commissioner, Mr. Langdon Cheves, referred to on page 77 of the foregoing.

In his opening paper, under date of February 25, 1825, he states the rule of indemnification or satisfaction for injuries suffered thus:

"The property of which he (the claimant) claims the equivalent belonged to him. It has been decided that it ought not to have been taken from him; it has been proved that it was taken from him as far back as the 17th February, 1815, and it has been agreed that he is to be compensated for the injury he sustained.

"The injury is the cause and the measure of his compensation. The only inquiry, then, is the extent of that injury. The extent of the injury is equivalent to the pecuniary value of the property *at the time he was deprived of it*, and the value of the sum of money of which he was deprived, during the period of its detention."

Again, he says "indemnification means a reimbursement of a loss sustained. If the property taken away on the 17th February, 1815, were returned now, uninjured, it would not reimburse the loss sustained by the taking away and consequent detention—it would not be an indemnification. The claimant would still be unindemnified for the loss *of the use* of his property for the ten years, which, considered as money, is nearly equivalent to the original value of the principal thing. So, in substituting a pecuniary value for the thing, unless interest is allowed for the use of the money, the claimant will remain unindemnified."

Again, in the same paper, "he who deprives another of the *use* of his property does him as great an injustice, in principle, if not in degree, as he who deprives him finally and forever of it, and justice equally requires that he should indemnify him for the loss of its *use* as for the loss of the principal thing. Unless it can be truly averred that one may deprive another of the *use* of his property for a given time, and if he finally return it uninjured in its identity, not be bound in justice to compensate him for the loss of its *use*, it is conceived it cannot be truly asserted that interest does not follow the principal."

Again, "if interest be an incident usually attendant on the delay of payment of debts, damages are equally an incident attending on the withholding an article of property; and where they are rendered in the shape of damages, they are usually given with a liberal and sometimes an unsparing hand. It is, then, a *mitigation* of the usual incident of damages for the detention of property, to establish a fixed and equitable rate of interest as the equivalent."

"There is no doubt that this is the leading reason why boards of commissioners, sitting as the representatives of nations, have so generally made interest the rule of damages, instead of a capricious discretion, which would, perhaps, often become an unjust and vindictive assessment of them."

Again, "the claim is not of interest *co nomine*. It is adopted as a *mitigated* rule of damages, compensation, or indemnification, founded on the estimated pecuniary value of the article withheld. In that case,

the common law and the civil law are both clear in allowing reparation of the loss of the *use* of the thing withheld from the commencement of the tortious detention. The rule of the *public law* is the same."

Case of Mrs. O'Sullivan and opinion of Attorney General, referred to on page 78 of the foregoing.

This was a claim growing out of the seizure of a ship and cargo by a political agent of the United States.

Congress passed an act providing "that the Secretary of the Treasury be, and he is hereby, authorized and directed to cause the claim of Mary O'Sullivan, widow and executrix of John O'Sullivan, deceased, to be examined by the accounting officers of the treasury; and that there be allowed and paid to the said Mary O'Sullivan, out of any money, &c., THE AMOUNT OF THE ACTUAL LOSS which may be shown, to the satisfaction of the Secretary of the Treasury, to have been sustained by the said John O'Sullivan, in consequence of the act of the late John M. Forbes, commercial and political agent of the United States of America at Buenos Ayres, in detaining the vessel of the said John O'Sullivan, in the year 1823, and causing her to be sent to the United States."

This act required payment of the amount of the "actual loss" as shown to the satisfaction of the Secretary of the Treasury. The case was referred to the Attorney General Butler, as to the proper rules to be adopted in ascertaining "the actual loss," and whether the claimant "was entitled, within the terms and intention of the act, to compensation for the *deprivation of the use* of the vessel during her detention?" and "whether that was not a constructive and consequential, and not an *actual loss*?"

Mr. Butler, after an elaborate examination of the authorities, deduced a rule from the decisions of the federal courts, where *interest* upon the original value, by way of damages for the loss of the *use*, in addition to such original value, had been allowed as the measure of the actual loss; in every one of which cases he says, "Congress passed acts indemnifying the officer to the full extent of the recovery against him," citing "Laws U. S., 4 vol. p. 91; 3 vol. 369; 6th vol. 282; 7 vol. 259."

"The adjudged cases," he says, "in which recoveries have been had against officers acting in good faith, and in which Congress afterwards made provision for indemnifying the officer, may, therefore, with great propriety, be referred to, for the purpose of ascertaining the manner in which the rule is carried into effect."

He further says, "I cannot agree that the loss of the *use* of the vessel was merely a *consequential loss*; still less that it was constructive and not actual. It appears to me that the loss of the beneficial *use* of the vessel was the direct and immediate effect of the interference of Mr. Forbes. But even if this is to be regarded as a *consequential loss*, it will not, therefore, follow that it is not an actual loss, in strict propriety of language, and within the meaning of the law. A loss may be actual, positive, and real, and may be traced with certainty to a particular cause. The distinction between *immediate* and *consequential damages* is a familiar one in commercial law; it is the foundation

of the distinction between the action of trespass, and that of trespass on the case; the former of these actions being brought where the damage is immediate, and the latter where it is only consequential.

"In each case, however, *actual* damage is the subject of the suit, and must be proved to sustain it."

Mr. Butler concludes that "it is obvious that the difference in the *value* of the vessel is not the whole loss sustained; the beneficial *use* of the vessel is also lost to the party during the whole period of the detention; and for this loss, interest on the prime value is but the *lowest rate* of indemnification."

Judge Bibb on the Florida cases.

The letter of the Secretary of the Treasury of the 4th of November, 1853, to the Attorney, for his opinion, is in these words and figures:

"Herewith you will receive the papers relating to the claim of Reddin Blunt, arising under the 9th article of the treaty of 1819 between the United States and Spain.—(Little & Rrown, 8 vol., Treaties, p. 260, and the acts of Congress of the 3d of March, 1823, vol. 3, p. 768, and the 26th of June, 1834, vol. 6, private laws, p. 569, passed to carry the said article into effect.) The amount claimed under the award of the judge of the district court of the United States for the northern district of Florida, as the value of the property destroyed, is $1,760, and the amount claimed under the award as interest, at the rate of five per cent. per annum, by way of damages, from 10th of May, 1813, to 26th June, 1835, is $1,847 42.

"The act of 3d March, 1823, directly, and the act of 26th June, 1834, by implication, provide that the amount payable under the said treaty and acts shall be paid out of any money in the treasury not otherwise appropriated. The appropriations were indefinite in amount, and without express limitation of time, unless in those provisions of law which relate to the surplus fund; and claims of this description, presented at the treasury, have, for a series of years past, been paid out of such indefinite appropriations, without any estimate being laid before Congress of the amount, and without there being any presentation of the amount payable or chargeable to such appropriation from year to year.

"You will also receive a list of other claims, arising under the same article of the treaty and laws, on which payments have been made, under the awards, to the amount (for the value of the property destroyed) of $, and on which the claimants now demand, as in the case of Blunt, the interest as decreed by the court by way of damages, amounting in the aggregate, as it is supposed, to nearly one million of dollars.

"This latter part of these claims awarded by the judges was first rejected by Mr. Secretary Woodbury, under the "usage of the Treasury Department," in the case of the heirs of John Gianopoly, the sum allowed as the value of the property on which was paid on the 5th June, 1837, as shown by the accompanying papers, and the decision thus made has continued to govern in these cases to the present time.

"The subject is now respectfully submitted to you for your opinion on the following points:

"1st. Whether the claims of Reddin Blunt, and others of the same class, are just and equitable, within the provisions of the treaty, so far as the award is for the value of the property alleged to have been destroyed?

"2d. Whether the interest awarded on said claims by way of damages was properly so awarded, as part of the measure of satisfaction to which the claimants were entitled, and payable on the principles of law by the Secretary of the Treasury?

"3d. Whether the decision of Mr. Secretary Woodbury in refusing to pay interest, on the ground that its payment was not consistent with the "usage of the Treasury Department," is binding on his successor in office, in the particular case in which the decision was made, and should restrain the payment in other cases, in which the value of the property has been paid for, and in the case of Reddin Blunt, in which neither this value nor the interest has been paid?

"4th. Whether, considering the spirit of our institution and the relations of the executive departments to the legislative, it would be consistent with a just public policy for this department to pay this class of claims, and to such amount, without any further action on the part of Congress, or other authority than the appropriations made in 1823 and 1834, as before stated, and without the amount being submitted as an estimate, or reported as a contingent charge, depending on such appropriation on the treasury?"

I. In respect of the first question: it appears by the report of the Solicitor of the Treasury to the Secretary of the Treasury, that on the 18th June, 1835, the administrator of Reddin Blunt filed his petition against the United States, before Robert R. Reed, judge of the superior court for the eastern district of Florida, setting forth, that the decedent, Reddin Blunt, his intestate, was a subject of his Catholic Majesty, inhabiting East Florida in the years 1812 and 1813; that he sustained loss and damage to the sum of $2,600, by the operations and depredations of the American troops in those years, the bill of particulars of which was exhibited; that no part of the said loss and injury was sustained previous to the entranc of the United States, or their agents, into the province of east Florida; that at the time of suffering the losses he was a resident and inhabitant of the province of East Florida, and a subject of his Catholic Majesty, the King of Spain.

The petition was verified by the oath of the petitioner; whereupon such proceedings were had, such testimony taken, and continuance of the proceedings before J. H. Bronson, judge of the court of the United States for the northern district of Florida, and that Judge Bronson, upon satisfactory evidence before him given, made this decision:

"I do therefore award and adjudge, that the United States pay to the administrator of Reddin Blunt, deceased, the sum of sixteen hundred and seventy dollars, together with interest thereon, at the rate of five per cent. per annum, from the 10th day of May, 1813, to the 26th of June, 1835, in satisfaction of the losses and injuries suffered by the said Reddin Blunt in his lifetime, and in the years 1812 and 1813, by means of the operations of the American troops in those years in East Florida."

Certified to the Secretary of the Treasury, 28th of November, in *the year 1848.*

Upon the presentation of this claim, the party demanding both principal and interest, the Secretary of the Treasury, (Hon. R. J. Walker,) on 28th February, 1849, sent to the Attorney General for his opinion these questions, endorsed upon the argument of counsel in the case:

"1st. Whether the provisions of the treaty require the losses or injuries for which satisfaction is provided to be established judicially, and if so, whether the decree of the judges as to the amount or extent of said losses or injuries, as to cases within the provisions of the treaty, are final?

"2d. Whether the measure of satisfaction adopted and applied by the judges in these cases, namely, to add to the value of the property at the time of its loss interest, as a compensation for the loss, or deprivation of its use, is or is not in accordance with the laws and usages of nations, as the rule of redress for such injuries, and can be allowed and paid by this department, under the acts of Congress applicable to this subject?"

The claim of Francis P. Ferreira, administrator of Francis Pass, came before Judge Bronson, of the district court of the United States for the northern district of Florida, under the sixth section of the act of Congress approved 22d of February, 1847, entitled, "An act to regulate the exercise of the appellate jurisdiction of the Supreme Court of the United States in certain cases, and for other purposes," (9 Stat. at Large, by Little & Brown, p. 130, chap. 17: Bioren, p. 21, ch. 17,) which sixth section provided that unfinished business, and proceedings pending before the judge of the superior court at St. Augustine, by virtue of the "Act for the relief of certain inhabitants of East Florida," approved 26th of June, 1834, or under any other act granting special powers, or imposing special duties upon said judge, be transferred to the judge of the district court of the United States for the district of Florida, there to be proceeded in as might have been by the judge of the superior court at St. Augustine; and also by virtue of a special act of 3d March, 1849, in favor of this and other claimants who had neglected to file their claims within the time prescribed by the act of 26th of June, 1834.—(For this act of 1849, see Stat. at Large, by Little & Brown, vol. 9, p. 783, chap. 181; Session Acts, printed by Gideon, pamphlet edition, 1849, p. 148, ch. 181.)

This claim by Ferreira, administrator of Pass, was adjudged at an extra term of the said district court of the United States for the northern district of Florida, at St. Augustine, on the 30th of August, 1851.

The judge allowed for the several and particular losses and injuries "by the operations of the American troops in East Florida, suffered by Pass, a Spanish subject residing in East Florida, and between 17th March, 1812, and 10th of May, 1813," the sum annexed to each particular—

Amounting aggregately to.....	$6,080 00
"Interest on this amount, at five per cent. per annum from 10th of May, 1813, to 26th June, 1835,.....	6,726 83
Making in all.....	12,806 83

"I do therefore adjudge and decide, that the United States pay to said Francis P. Ferreira, administrator of Francis Pass, the aforesaid

sum of $12,806 83, in satisfaction of the losses and injuries suffered and sustained by the said Francis Pass, deceased, in his lifetime, and in the years 1812 and 1813 by the operations of the American troops in east Florida in those years."

These claims of Reddin Blunt, deceased, by his administrator, and of the administrator of Francis Pass, are clearly within the provisions of the treaty, clearly within the jurisdiction of the court by which they were decided, clearly just and equitable, "so far as the award is for the value of property, alleged to have been destroyed." As to these, your first question I answer in the affirmative.

An inspection of the records in the other cases will, no doubt, satisfy you upon this point, as they satisfied your predecessors in office, who, upon inspecting the records, ordered payments for the value assessed for the property lost or destroyed, although they withheld the other assessment of interest on that value.

II. The second question can be answered by the adjudications and concurrent opinions of judges and jurists, so as not to leave a loop whereon to hang a doubt; for whether we consult the law of nations or municipal law, the answer is the same. I will begin by citing the decisions of the Supreme Court of the United States:

The "Anna Maria," belonging to citizens of the United States, sailed from the United States in September, 1812, with a cargo belonging to American citizens, bound to St. Bartholomews, a neutral island.

On the 16th October she was boarded by the master of the privateer "None Such," of Baltimore, and taken as prize. She was carried to St. Jago del Cuba. The officers of the privateer "None Such" there sold a part of the cargo of the "Anna Maria." In attempting to bring her out of port she was run aground and injured, after which she was sold, with the residue of her cargo: the money remained in the hands of the American consul for those who may be entitled. The "None Such" afterwards returned to the United States, and a libel was filed in the admiralty by the owners of the "Anna Maria" against the owners of the "None Such," in the district court of the United States for the Maryland district. Upon appeal, Chief Justice Marshal delivered the opinion of the court, and after stating, that "However meritorious may have been the services of the private armed vessels of the United States, in the aggregate, those individuals who have acted with such culpable disregard of the rights of others ought not escape the animadversion of the law. * * The honor and the character of the nation are concerned in repressing such irregularities; and the justice of this court requires that compensation should be made for the injury which the libelants have sustained.

"The sentence of the circuit must be reversed, and the cause remanded, * * * with directions to reverse the sentence of the district court, and to direct commissioners to ascertain the amount of damages sustained by the libelants; in doing which the value of the vessel and the prime cost of the cargo, with all charges and the premium of insurance, where it has been paid, with interest are to be allowed."—(2 Wheat. 334, 335.)

In the "Amiable Nancy," (3 Wheat. 560,) the rule of damages is again repeated, thus: "It was, after strict consideration, held that the *prime cost,* or value of the property lost, at the time of the loss, and

in case of injury, the diminution in value by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete indemnity for all possible injuries, but it has certainty and general applicability to recommend it, and in almost all cases will give a fair and just recompense."

In the case of "The Apollon," (9 Wheat. 376,) this rule of damages is again thus repeated: "This court, on various occasions, has expressed its decided opinion that the probable profits of a voyage, either upon the ship or cargo, cannot furnish any just basis for the computation of damages in cases of marine loss. The basis has accordingly been in every instance rejected. Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with interest upon the amount from the time of the trespass. Where there has been a partial injury only, that that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period of detention has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense, and the addition of ten per cent. has been sometimes made, where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination.

"Such, it is believed, have been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation upon principles of public policy."

In Del Col *vs.* Arnold, (3 Dallas, 333,) the district court pronounced a decree in favor of the owner of the ship "Grand Sachem" and cargo, against Del Col, the owner of a privateer, for illegal capture and destruction of the "Grand Sachem" and her cargo, "for the sum of $33,329 87, the full value of the "Grand Sachem" and her cargo, with interest at ten per cent. from the day of the capture." This decree was affirmed by the circuit court, and also by the Supreme Court of the United States.

In Maley *vs.* Shattuck, (3 Cranch,) the allowance of interest upon the value of the vessel, as a component part of the indemnity to be satisfied, was excepted to (p. 477) and affirmed, (p. 492.)

The like rule of indemnity was decreed in "The Lively."—1 Gallison, 315.)

The admiralty courts of Great Britain concur with the cases before cited, as the charge of interest, as a portion of the just measure of compensation for property taken, injured, or destroyed. The cases are numerous; of these a few will suffice:

The Acteon, (2 Dodson, 84.) The Lucy, (3 Rob., 208.)

The Driver, (5 Rob., 145.) In this case the rule is stated, that if, after the damages and costs are assessed and allowed, payment is delayed, the court will allow interest upon the whole sum from the time of the assessment, although it includes interest on the value of the property converted or injured.

The case of "the Pigon" and her cargo, decided in France by the council of prizes, (reported in note to the "Charming Betsey," 2 Cranch, 98 to 101,) is in accordance with the aforegoing cases as to the allowance of interest. The "Pigon" was captured and libeled as lawful prize. Captain Green claimed that the vessel and cargo was neutral property, and demanded that the vessel and cargo and specie on board should be delivered up, with damages and interest. Portalis, in a learned opinion, declared the "Pigon" not lawful prize, and that the vessel and her cargo be restored, with damages and interest, in the usual form; and so the council of prizes also determined.

These cases decided in the courts of admiralty are all adjudged according to the law of nations.

"The court of prizes is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."—(9 Cranch, 284. The schooner Adeline.)

When we resort to decisions of the courts, who take their character and their rules from municipal law, we find their rules of giving *interest* upon the value of the property taken, converted, detained, or destroyed, as a component part of the satisfaction to be made for the injury, to be in accordance with the decisions of the courts of admiralty.

In Conard *vs.* The Pacific Insurance Company, (6 Peters, 273, 281,) the case was, the company sued Conard, (the marshal of the United States,) in trespass, for illegally taking and carrying away sundry packages of teas. Justice Baldwin instructed the jury that the plaintiff was entitled "to legal satisfaction for the injury sustained by the taking and detention, in cases not attended with circumstances of aggravation." * * * "The general rule of damage is the value of the property taken, with *interest* from the time of the taking down to trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated." This charge and instruction was affirmed by the Supreme Court of the United States.—(6 Peters, 281.)

The decisions of the courts of Great Britain, the decisions of the courts of the several States of this Union, concur (*nemini contradicente*) in the rule of indemnity above quoted.

"Detinue lies for the recovery of goods in specie, and also for damages for the detainer, * * * trover is the action in more common use."—(Buller's N. P. Ch. 3-49.)

In Fisher *vs.* Prince, (3 Burr,) in trover, the defendant obtained a rule upon the plaintiff, to show cause why, upon delivering to the plaintiff the several goods and chattels for which action was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed." The court denied the motion and discharged the rule. Mr. Justice Wilmot said, "where there is an uncertainty, either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, there it shall not be *brought* in." Lord Mansfield said, * * * "In trover for money

in a bag, or numbered, the court have ordered it to be brought in, yet the jury may give more in damages; they may allow *interest*, (and in some cases they ought.) The reason holds in every case where a thing clearly remains of the same value; yet the jury may give damages for the detention. I remember its being done twice or thrice in things of small value. It ought to be done to prevent vexatious litigation. It ought to be done because it is the specific relief." * * * "When the thing remains (at the trial) in the same condition, there generally is a rule 'to deliver it.' "

"But as I think such motions ought neither to be refused or granted, 'of course,' they must depend on their own circumstances. No injury is done to the plaintiff if the court should think 'he ought not to proceed for damages beyond the specific thing,' because he may *still* proceed for more at the peril of cost; and so he ought.

"But in this particular case the goods are altered and their value changed."

By these decisions of Lord Chief Justice Mansfield and Justices Wilmot and Buller, tort, alteration of the value of the thing, and detention, are several causes of injury, for which damages by way of interest beyond the value of the thing ought to be allowed in making just compensation to the injured party.

In Eakins *vs.* East India Company, (1 Pr. Wms. 395,) the complainant brought his bill for an account of a ship and cargo wrongfully taken from him in the East Indies by the defendant. On issue to try the value of the ship and cargo, the jury found the value of the ship at £3,000, and of the cargo at £600, at the time these came to the hands of the defendant. The complainant insisted that he ought to have interest, and *Indian* interest, which was twelve per cent.

Defendant objected, 1st, that the value of the ship and cargo being uncertain it did not carry interest but from the time it was ascertained by the jury; 2d, that the complainant had rested thirteen years on his own bill, and therefore to allow him Indian interest would make him gainer by his own delay.

By the Chancellor. "If a man has my money by way of loan, he ought to answer interest; but if he takes my money from me wrongfully, he ought, *à fortiori*, to answer interest; and it is still stronger where one by wrong takes from me my goods which I am trading with." The interest was decreed at the Indian rate. This decree was affirmed in the House of Lords.—(2 Brown's Parl. Cases, 72, S. C.; 2 Eq. Ca., abr., ch. 1, p. 534.)

The principle that, in cases of trespass and trover, and such like, the proper rule of indemnity from the wrong doer to the injured party is the value of the property at the time of the wrong done, or conversion, together with interest on that value, has been well settled by numerous decisions in the courts of the States of this Union. I have not seen any adjudication to the contrary.

These citations will suffice for the present occasion:

Maine.—Church *vs.* Cherryfield, 33 Maine Rep., 457.

Massachusetts.—Kennedy *vs.* Whitwell, 4. Pick., 466. Greenfield *vs.* Leavitt, 17 Pick., 3. Barry *vs.* Bennett, 7 Metcalf, 354, 363.

Connecticut.—White *vs.* Webb, 15 Connect. Rep., 305.

New York.—Wilson and Gibbs *vs.* Conine, 2 John. Rep., 282.

Bissel *vs.* Hopkins, 4 Cowen, 52, 53. Dutterback *vs.* Jerome, &c., 7 Cowen, 300. Hyde *vs.* Stone, 7 Wendell, 355–358.

Maryland.—Hebburn *vs.* Sewall, 5 Harris and John, 212.

South Carolina.—Banks *vs.* Hatton, 1 Nott and McCow, 222. Talbird *vs.* Baynard, 2 Hill S. Car. Rep., 599.

Kentucky.—Pope *vs.* Campbell, Hardin, 31. Meed *vs.* Phillips, Littell's Select Cases, 50. Outton *vs.* Barnes, Littell's Select Cases, 136.

Alabama.—St. John *v.* O'Connel, 7 Porter Rep., 481.

Vattell, (Book ii. chap. xviii. § 342, p. 263,) says, "If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, or make a just satisfaction, the other may seize what belongs to it and apply it to its own advantage, till it has obtained what is due for interest and damage, or keep it as a pledge till full satisfaction has been made."

In sec. 347 he says, "We may use reprisals against a nation, not only for the actions of the sovereign, but also for those of his subjects. * * * In the same manner the sovereign demands justice, or makes reprisals, not only for his own affairs, but also for those of his subjects, whom he ought to protect, and whose cause is that of the nation."

The cases which are the subjects of the present question are violent depredations committed by citizens of the United States, connected with the American army; acts done in violation of the laws of nations, and in violation of the treaty between the United States and Spain, for which his Majesty the King of Spain demanded satisfaction, and for which the government of the United States engaged its faith to make satisfaction to the injured Spanish officers and individual Spanish inhabitants.

To avoid confusion and error in future, and to correct the mistakes of the past, upon this subject of "*interest*," we must bear in mind the distinction between different kinds of injuries proceeding from different causes.

All sorts of injuries, from whatever cause arising, are of two kinds. The one class, visible injuries caused by those who destroy or cause the loss of a thing, for which they ought to make satisfaction to the party injured; as if the borrower of a horse loses or lames him; or if one pastures his cattle wrongfully upon another's meadow, &c. The other class is of injuries caused by those who, without any destruction, loss, or deterioration of a thing, do nevertheless cause some loss of another nature; as if one who owes a sum of money does not pay at the time appointed; or if he who sells fails to deliver the thing sold; or if one who undertakes a piece of work fails to perform it, &c. Again: injuries are distinguished in another view, acccording to the motives of those who caused them. Some are the effects of the bad intention of those who cause them, as of crime, trespass, or deceit; others arise from no evil intent of those who cause them, but from negligence, mistake, or inability to perform some engagement.

Of what nature soever the injury may be, and from what cause arising, he who has caused the injury is bound to make reparation, proportioned, either to his fault, or to his mistake, or any other cause on his part, and according to the loss which he has caused.

All kinds of these indemnities are reduced to two species; the one is called simply "interest," and the other is called "loss and interest." The interest, simply, is the indemnification and amends which

a debtor in a sum of money is bound to make to his creditor, for the injury caused by delaying to pay the sum of money which he owes. As if one who has borrowed a sum of money does not pay it at the appointed time; if the purchaser does not pay the price of the sale; or a tenant does not pay the rent of his farm. All the other indemnities, of whatsoever the nature of the injury may be, are called "losses and interests." As if a tenant fails to make the repairs which his lease binds him to make, whereby the house is injured; if a guardian neglects to demand the debts due to his ward, whereby they are lost; If the vendor does not guard the purchaser from eviction. And the same name of "losses and interests," is given to all injuries which others cause, by crime, misdemeanor, or trespass, &c.—(Domat, Book iii, Title v., and Sect. i. and ii., Paris ed. of 1777, pp. 258 to 271.)

In this sense Vattell uses (in Book ii., Chap. 18, Sec. 342, p. 263) the words "interest and damage," in speaking of seeking satisfaction for them by reprisals.

All those injuries, for which the indemnities due are classed as "losses and interests," consist of two parts: first, the wrongful act itself which causes the loss; secondly, the continuation of the wrong, in withholding due reparation, which causes the interest. The loss is the principal, the interest is the incident; the two together make up the sum of damages for which satisfaction is to be made.

The writers on public law all agree that in estimating the damages which any one has sustained, when such things as he has a perfect right to are taken from him, withholden, or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. He who is the owner of a thing is the owner of such fruits or profits, so that it is as properly a damage to be deprived of them as to be deprived of the thing itself.—(Rutherforth's Institutes, Book i., Chap. xvii. Sec. 5, p. 390. Grotius, Book ii., Chap. xvii., Sects. 4, 5, 12, 13, 14, 15, 1 6, pp. 371 to 373. Puffendorf, Book iii., Chap. i., Sec. xi., p. 312. Vattell, Book ii, Chap. xviii., Sec. 342. p. 263.)

In our intercourse with foreign nations, in every treaty where a foreign nation has stipulated for making satisfaction for the property of our citizens, taken from them contrary to the law of nations, or to treaty, we have exacted the value of the property at the time of the trespass, together with the interest on that value, as being the rule of just and adequate compensation.

By the 7th article of the treaty between the United States and Great Britain, signed 19th November, 1794, (8 vol. Stat. at Large, by Little & Brown, p. 121,) the British government stipulated to make "full and complete compensation" for losses and damages to citizens of the United States, by reason of irregular or illegal captures or condemnation of their vessels, or other property, under color of authority, or commissions from his Britannic Majesty. "For the purpose of ascertaining the amount of any such losses and damages," a joint commission was instituted. That commission, consisting of Messrs. Pinkney and Gore, on the part of the United States, and Sir Edward Nicholl and Mr. Swabby, on the part of Great Britain, adjudged to the claimants respectively, "the original cost of their property, and all the expenses they had actually incurred, together with

interest on the whole amount."—(American State Papers, Foreign Relations, vol. 2, pp. 119, 120, and 387, 388.)

By the 21st article of the treaty of the 27th October, 1795, (8 Stat. at Large, by Little & Brown, p. 150,) Spain agreed that "the losses sustained by citizens of the United States, in consequence of their vessels and cargoes having been taken by the subjects of his Catholic Majesty during the late war between Spain and France," should be referred to the final decision of commissioners, to be appointed as provided in the treaty. That joint commission awarded interest on the value of the vessel and cargo, as a component part of the damages and indemnity.—(American State Papers, Foreign Relations, vol 2, p. 283.)

Under the treaty of Ghent, a difference in the construction arose between the United States and Great Britain, which being submitted to the arbitrament of the Emperor of Russia, he awarded, that the United States were entitled "to a just indemnification from Great Britain for all private property carried away by the British forces." The members of the joint commission for adjusting the claims for property carried away differed as to the measure of damages. The commissioner of the United States, Mr. Cheves, insisted on interest from the time of the asportation, in addition to the value of the property, as the proper measure of damages. He said, "the claim is not of 'interest,' *eo nomine*, it is adopted as a mitigated rule of damages, compensation, or indemnification, founded on the pecuniary value of the article withheld; in that case the common law and the civil law are both clear in allowing reparation of the loss of the use of the thing withheld from the commencement of the tortious detention. The rule of the public law is the same." * * * "If the property taken away on the 17th February, 1815, were returned now, uninjured, it would not reimburse the loss sustained by the taking away and consequent detention. * * * The claimant would still be unindemnified for the loss of the use of his property for ten years, which * * is nearly equivalent to the original value of the principal thing."

The opinion of Attorney General Wirt was asked by the Secretary of State. Mr. Wirt sustained the rule as stated by Mr. Cheves.—(Opinions of Attorneys General, vol. i., p. 499, May 17, 1826.)

Mr. Clay, then Secretary of State, in his letter of 15th April, 1826, to Mr. Vaughan, the British minister, insisted, "that interest is a fair and just component part of the indemnification which the convention stipulates."

This difference was finally settled between the two governments, the British government paying, and the United States accepting, the gross sum of $1,204,960. These claims of the American citizens were adjusted by a commission appointed by the government of the United States. That commission adjudged to each claimant the the value of his property carried off, with interest from the time of the asporation, as being the proper measure of indemnity. Of this the records in your department contain full evidence.

The earnestness with which the government of the United States has insisted on this rule of assessing damages, and the correctness of the rule, will be seen in the correspondence between the government of the United States and that of Great Britain, in the cases of the vessels "*Encomium* and Comet."—(President Jackson's Message of 14th Feb.,

1837, and President Van Buren's of 13th February, 1839, and of January 27th, 1840. Senate Doc., 2 sess., 24 Cong., No. 174, and 3d sess., 25 Cong., Doc. No. 216, and 1 sess. 26 Cong., Doc. No. 119.

The King of the Two Sicilies, in the treaty negotiated on the part of the United States by the Hon. John Nelson, (afterwards Attorney General,) agreed to pay to the United States, for spoliations by King Murat, upon the vessels and cargoes of the citizens of the United States, 2,115,000 ducats, by instalments, with interest. This sum was distributed among the respective claimants by a commission instituted by the United States. The commissioners allowed to the sufferers the value of their property, at the time of the spoliation, with interest.—(Mr. Nelson's letter to Mr. Livingston, of 3d October, 1832, from Naples. Elliott's Diplomatic Code, vol. 2, p. 625, No. 141. The treaty, Stat. at Large, vol. 4, p. 440. Act of 2d March, 1833, Stat. at Large, vol. 4, p. 666.)

The joint commission under our treaty with Mexico, of 11th April, 1839, (consisting of the Hon. Wm. L. Marcy and John Rowan, on the part of the United States,) awarded to the American claimants the value of their property taken, with interest from the time of the tort, as shown by the report of the commissioners, with their tabular statements of the claims finally adjudged.—(President's message of 26th August, 1842, with report of the commissioners, Executive Doc., House of Rep., 2 sess. 27 Cong., vol. 5, Doc. 291, p. 30, and tabular statements from p. 50 to 61.

For wrongs and detentions by the government of the United States, interest has been paid in the following cases, viz:

In Mrs. O'Sullivan's case, "for actual loss" * * "sustained by detaining the vessel at Buenos Ayres, and sending the vessel from thence to the United States."—(Opinion of Attorney General Butler, of 20th of May, 1837. Printed Opinions, vol. 1, p. 1110, under act of July, 1836. Laws United States, by Little & Brown, vol. 6, p. 679, chap. 339.)

By opinion of same of 23d March, 1838, in case of a draft by the department on the bank of Alabama, which was protested.—(Printed Opinion, p. 1179.)

In Sibbald's case. By the award of Attorney General Nelson, under act of Congress for the relief of Charles F. Sibbald, (6 Stat. at Large, by Little & Brown, p. 864, chap.—,) passed 23d August, 1842, directing the Third Auditor, "under the direction of the Attorney General, to ascertain the actual damages which Charles F. Sibbald has sustained, and would be entitled to recover upon the principles of law, as applicable to similar cases, by reason of the interference of any agent or agents of the United States, acting under their authority, with the use, possession, or enjoyment of his lands, timber, mills or other property in East Florida." Under this statute Attorney General Nelson, in assessing the damages, allowed interest upon the sum, from the time of the tort. (Letter of the Secretary of the Treasury to House Rep. of 16th of March, 1853. Executive Doc., 32 Cong., 2 sess., Doc. No. 68, p. 27.)

Attorney General Nelson said: "Interest is not ordinarily chargeable against the United States; but I understand the act of Congress for the relief of Mr. Sibbald, which puts his claim 'upon the princi-

ples of law, applicable to similar cases,' in terms to authorize it, and I therefore direct its allowance." Under this act of 1842, Attorney General Nelson found the principal sum of $14,296 64 for the trespass as of 30th September, 1830, which, with the interest thereon as directed, amounted, of principal and interest for whole indemnity, to $27,132 64, which was paid at the treasury.—(Same House Doc. No. 68, p. 27.)

In case of the representative of George Fisher, under act of Congress of 12th April, 1848, (9 Stat. at Large, by Little & Brown, p. 712, chap. 30,) directing the Second Auditor to adjust the claims "on principles of equity and justice, * * * for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year 1813, * * * so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops." The interest on the value of the property destroyed was allowed by opinion of Attorney General Towsey of 13th February, 1849. (2 vol. print. Opinions., p. 2139.)

In these cases, interest, *eo nomine*, was not allowed; but it was taken into the assessment of damages, as a component part of the injury for which satisfaction was due.

The opinion of Attorney General Taney, of 10th September, 1831, (now chief justice of the United States,) on Maj. Tharp's case, (vol. 1. Op. Atto. Genl., p. 785,) will set this question of interest, when to be paid by the government, and when not, in a proper light. He says:

"I am not aware of any statute of the United States which forbids the Secretary of War, or the accounting officers, to allow interest to a claimant, if it should appear that interest is justly due to him. As the United States are always ready to pay when a claim is presented, supported by proper vouchers, it can rarely, if ever, happen that they are justly chargeable with interest, because it is the fault of the claimant, if he delays presenting his claim, and does not bring forward the proper vouchers to prove it, and justify its paymant. But in Major Tharp's case, or any other, if the Secrtary of War, upon a review of the whole evidence, should be of opinion that interest is justly due to the claimant, I think he may legally allow it."

Upon the facts out of which your second question arises, I answer that the interest adjudged to the claimants as a component part of the damages, and for the loss of the user of their property, was very properly allowed.

It is a rule of satisfaction for injury established at home and abroad by the highest judicial authority.

It is a mitigated and general rule, which does not include vindictive damages for aggravated injuries. It is the rule of the common law; the rule of the civil law; the rule of the law of nations; the rule of the christian world.

This measure of damages we obtained for our own citizens from Spain under the treaty of 1795; we cannot refuse the same rule to Spanish subjects under the treaty of 1819, without glaring inconsistency and breach of faith.

III. The third question involves the true construction of the 9th article of the treaty between the United States and Spain; and of the acts of Congress passed to carry that 9th article into effect, and of the *powers given* by those statutes to the Secretary of the Treasury.

The treaty was signed at Washington, on 22d February, 1819, but the ratifications were not exchanged until the 22d February, 1821, (6 vol. Laws United States, by Bioren & Duane, p. 614 to 631; Stat. at Large, by Little & Brown, vol. 8, p. 260.)

The 9th article, after reciprocal renunciations by the two contracting parties of all claims for damages or injuries specially mentioned, extending from the time of the convention of 11th August, 1802, to the time of signing the treaty, including renunciations, respectively, of all claim to public indemnities "for any of the recent events or transactions of their respective commanders and officers in the Floridas," concludes thus: "The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

By act of Congress of 3d March, 1823, (3. Stat. at Large, by Little & Brown, p. 768, chap. 25,) it is enacted "That the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims arising within their respective *jurisdictions*, of the inhabitants of said Territory, or their representatives agreeably to the provisions of the 9th article of the treaty with Spain, by which the said Territory was ceded to the United States."

"SEC. 1. And be it further enacted, That in all cases in which the said *judges* shall *decide* in favor of the claimants, the *decisions*, with the evidence on which they are founded, shall be, by the said *judges*, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of said treaty, shall pay the *amount* thereof to the person or persons in whose favor the same is *adjudged*, out of any money in the treasury not otherwise appropriated."

Mr. Secretary Rush paid the claims adjudged for depredations by the army committed in 1818 and 1819; but, by a hypercritical construction of the treaty, in dwelling upon the words, "the late operations of the American army in Florida," abstracted from all the other words of the 9th article, supposed the depredations of 1812 and 1813 were not within the treaty, and so refused to pay them. In consequence of which, the Congress passed the act of 26th June, 1834, (6, vol. Stat. at Large, by Little & Brown, p. 569, chap. 87,) directing the Secretary of the Treasury to pay, "out of any money in the Treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the act * * approved 3d of March, 1823, for losses occasioned in East Florida by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the *decision of the said judge* shall be deemed by the Secretary of the Treasury to be just: Provided, that no award be paid, except in the cases of those who, at the time of suffering the loss, were actually subjects of the Spanish government; and provided also, that no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States."

"Sec. 2. That the *judge* of the *superior court* of St. Augustine

be, and he is hereby, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of February 22, 1819, between the United States and Spain: Provided, that such claims be presented to the said judge in the space of one year from the passage of this act: and provided also, that the authority therein given shall be subject to the restrictions created by the provisoes to the preceding section."

Viewing the provisions of the 9th article of the treaty, and the provisions of the acts of Congress of 3d March, 1823; of 26th June, 1834; of 6th February, 1847, sec. 6; and of 3d March, 1849, *impari materia* (and therefore to be construed as one act,) every rational mind must be convinced that the Congress of the United States intended, and enacted those statutes for the purpose of fulfilling the stipulations of the treaty in good faith, without equivocation, and without subterfuge.

The provisions of the first act were as comprehensive as the stipulations of the 9th article of the treaty; the appropriation of money was commensurate with the treaty, without limitation as to the sum, or as to time. The blunder of the Secretary of the Treasury, to the prejudice of the claimants, was corrected by the act of 1834; the extinction of the superior courts of the Territory of Florida, by the admission of the inhabitants into the Union as a State, was supplied by the act of 1847; the delay of some of the claimants in presenting their claims was excused by the act of 1849; the jurisdiction to hear and determine the claims was assigned to the courts most convenient to the claimants and their witnesses.

Howsoever the executive officers of the government may have construed these acts, the Congress, without doubt, did intend, by those statutes, to carry into full and fair effect the stipulations of the government of the United States in the 9th article of the treaty, to preserve the public faith unsullied, to leave to the claimants no reasonable cause of dissatisfaction.

The engagement, in the last clause of the 9th article of the treaty, now under consideration was made by the United States to Spain, for the use and benefit of each Spanish officer and of each Spanish subject inhabiting the Floridas, who suffered injury by the late operations of the American army in the two Floridas, contrary to the law of nations and to the treaty of amity which was subsisting between the United States and the king of Spain at the time of the operations of the American army alluded to. So far as respected public wrongs and public indemnities for any of those recent events in the Floridas, they were mutually renounced by the preceding clause of the same article; and by previous clauses of the same article, the two contracting powers mutually renounced certain claims by the citizens and subjects of the respective governments to indemnities, which had been presented theretofore.

By the 11th article of the treaty the United States assumed to pay, for Spain, certain claims of the citizens of the United States against Spain, which then were unadjusted, but to be adjusted, and paid by *the United States*, to an amount not exceeding five millions of dollars,

out of the proceeds of the public lands ceded by Spain to the United States, or in such other manner as the Congress of the United States may prescribe by law. This article provides for a special commission of three persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, and for their oaths, and for supplying any vacancy, by death, sickness, or absence, and for furnishing documents, and for furnishing copies of the decisions to the Spanish government if required.

Comparing the 9th and the 11th articles of this same treaty, we have conclusive evidence that the two contracting powers did not mean the same thing, by "process of law," and by a "special commission."

Article 11 stipulates for establishing the validity and amount of one class of private claims on government by a special commission. Article 9 stipulates for establishing the validity and amount of another class of private claims upon the government of the United States by process of law.

The expression "process of law" has a known established signification in jurisprudence. The idea conveyed by the English words "process of law" is known in the law of nations, which requires judicial proceedings in courts of admiralty, whose decisions upon cases within their proper jurisdictions carry absolute verity, and are acknowledged by the law of nations as binding everywhere. There is a monition to give notice of the judicial trial, so that all persons interested may defend their interests if they will. The decision in a court of admiralty, of one nation, lawfully constituted, and upon a subject within its cognizance, is a legal justification, to all claiming under it, everywhere, in every nation.

The same idea intended to be expressed in the 9th article of this treaty with Spain by the English words "process of law" established is expressed by the Spanish words of the treaty, "*justificucu legalmente*," "lawfully proved to be just." The promise by the United States is made in their own language, of a matter to be done by them; the mode and manner of ascertaining what shall be done is expressed in words which have an established sense, and require a judicial proceeding.

The expression "process of law," to establish "by process of law," has been used from time immemorial. It is borrowed from the English Magna Charta, and Coke's Commentary on the 29th chapter. It is used in the statute of 27 Edw. III. It is contained in the resolutions of the colonies of Plymouth and Massachusetts, in the infancy of their establishment, as a safeguard for their lives, liberty, and property; also, in the resolutions of the general assembly of Connecticut, in 1639, and of New York's general assembly in 1691. It is contained in most of the constitutions of the several States of our Union. It is introduced into the Constitution of the United States by article 5 of the amendments. It was introduced into Magna Charta, into the constitutions of the States, and into the Constitution of the United States, to secure the administration of the laws of the land fairly, equally, openly, and impartially by the courts and judicial magistrates; to guard against executive power and arbitrary will. It is known to the civil law as the citation "*in jus vocando*," a warning to appear in court.—(Black. Comment., book iii., chap. 19, "Of Process,' pp. 279 to 292.)

That the words "which by process of law shall be established" (used in this treaty) do require a judicial proceeding, and are not fulfilled by an executive proceeding, will be made clear by the commentaries of the sages of the law.—(Coke's Commentary on the 29th of Magna Charta, 2 Inst., p. 50, &c. Judge Tucker's Commentaries on the Constitution of the United States. Tucker's Black., vol. 1, part 1, Appendix 203. Mr. Justice Story's Comment. on Constitution, vol. 2, book 3, Sect. 1789, p. 534. Chancellor Kent's Commentaries, vol. 2, part 4. Lecture 24, p. 1 to 13, 6th edition. Supreme court of New York, *ex parte*, John and Cherry streets. 19 Wendell's Rep., 676, and 4 Hill, p. 146.) In these cases the supreme court of New York adjudged that "process of law" means a proceeding had "in a court of justice, or before magistrates;" and so says Judge Tucker, Chancellor Kent, Justice Storey, and Sir Edward Coke.

The Constitution of the United States, in article 5 of the amendments, ordains, "no man shall be held to answer," &c. * * * "nor be deprived of life, liberty, or property, without due process of law."

What judge, what counsellor, what statesman, so heedless as to affirm that this precept of the Constitution would be fulfilled by a trial before an executive officer, by the definitive sentence of the Secretary of the Treasury?

The true sense and faith of the treaty, in binding the United States to make satisfaction for the injuries suffered by the Spanish subjects, "which by process of law shall be established," includes an engagement by the United States that they will suffer such process of law to be had and used by the Spanish subjects; an agreement for judicial proceedings; an engagement by the United States that those claims by Spanish subjects shall be heard and determined in the judicial tribunals, regularly established for administering, right and justice in general, and common to all.

Respect and confidence is due to the courts of every civilized nation established for the administration of justice to its own people. And certainly the judicial system of the United States, as established under the Federal Constitution, for the administration of justice in the States and Territories, in cases "in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under the authority of the United States," has been such as to inspire a salutary confidence at home and abroad.

The true meaning of the promise, the proper cause of confidence, the value of the guaranty, for satisfaction to be made for the injuries suffered by the Spanish inhabitants of Florida, consist in the engagement that the injuries, and the satisfaction therefor should be ascertained "by process of law"—by judicial proceedings; by the judicial tribunals for administering justice to citizens of the United States in Florida, and not in a special commission for trying claims upon the government by these Spanish sufferers alone; not by a tribunal to be established and appointed for that sole purpose, in which appointment neither the King of Spain, nor his injured subjects, would have a voice.

If for this class of claimants a special commission had been contemplated by the contracting parties, the number of commissioners, the mode of appointment, the duration of the commission, and the oath of *office, &c.,* would have been regulated by the treaty. The Congress

in good faith could not, and in legislating to carry this 9th article into effect did not authorize a special commission.

The first legislation on the subject is entitled, "An act to carry into effect the 9th article of the treaty concluded between the United States and Spain, the twenty-second day of February, one thousand eight hundred and nineteen," (3 Stat. at Large, by Little & Brown, p. 768,) the enactments whereof have been before set forth.

The first section gives the authority to receive and adjust the claims "to the judges of the superior courts established" at Pensacola and St. Augustine "respectively." Their respective duties and authorities are severed by reference "to their respective jurisdictions" as assigned by the law creating the courts, and assigning to each territorial limits.

The second section speaks of "the cases which the judges shall decide," and of the amount, and of person or persons in whose favor "the same is adjudged."

No new commission was authorized. No new appointment or new commission was issued by the President.

The Congress cannot create an office and appoint the officer by law. All appointments and commissions to office must be (by the Constitution) made by the President, by and with the advice and consent of the Senate.

This act created no new office or officer; it enlarged the jurisdiction of judges of courts within their old established territorial jurisdictions.

This is the total as to the judges, their authorities and commissions.

The act of 1834, in section 1, speaks of the amount awarded by "the judge of the superior court at St. Augustine." The second section directs "the judge of the superior court of St. Augustine" to proceed with the cases not heretofore presented to "the said judge," or in which the evidence was withheld in consequence of the decision of the Secretary: provided that such claims be presented "to the said judge" within one year.

It is evident, upon these acts, that if the person holding the commission of judge of the court resigned that commission, his authority to adjudicate these claims ceased; and as soon as a successor was commissioned and entered upon the duties of his office as judge of the court, that moment he had authority and jurisdiction to hear and determine these unfinished claims, without waiting for any other commission, instruction, or mandate; the authority was not personal to this or that man, but was a judicial power in its nature and character, and, as such, was vested in the judge of the court, and belonging to each and every succeeding judge of the same court.

The treaty required a judicial proceeding to establish the injury and the satisfaction to be made. The acts of Congress to carry the treaty into effect vested the judicial authority to receive and adjust the claims in the judges of courts, respectively. So far, the treaty and the legislative acts for fulfilling the treaty are in accord.

It is obvious that the Congress intended by these statutes to except the decisions of the judges from the appellate jurisdiction of the Su-

preme Court of the United States. No provision is made for any appeal in these cases to the Supreme Court of the United States, nor to any other court. If against the claimant, the decision was final; if in favor of the claimant, the whole amount is to be paid, if paid at all;—"shall pay the *amount thereof* to the person or persons in whose favor the same is adjudged."

The appellate jurisdiction of the Supreme Court of the United States is regulated by Congress, not by what the Constitution would permit, and "it cannot be deemed a denial of justice that a man shall not be permitted to try his case two or three times over."—(Wiscart *vs.* Dan, 3 Dallas, 328, 329. United States *vs.* Moore, 3 Cranch, 172. Durousseax *vs.* United States, 6 Cranch, 313)

The Congress might, if they would, have authorized an appeal in these cases to the Supreme Court of the United States; but they intended that the decisions of the judges should be final, as they are in many cases, by the judiciary act of 1789. The mere appellate jurisdiction of the Supreme Court from the decisions of the inferior courts of the United States, depends upon such exceptions and regulations, both as to law and fact, as the Congress shall make.

So far, the acts of Congress to carry the treaty into effect conform to the Constitution and to the treaty.

But the act of the Secretary of the Treasury in paying only a part of the judgments, and refusing to pay so much as relates to the interest, supposes that the statutes have given him an appellate power to review and reverse the decisions of the judges; and this power is supposed to result from these words: "the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged." The acts of 1823, 1834, 1847, and 1849, being *impari materia*, are to be construed together as one act.

That an appellate jurisdiction was not given to the Secretary of the Treasury; and that the only intent of the acts was, that the Secretary should be satisfied from the evidence that the case was justly and equitably within the provisions of the treaty, and so within the jurisdiction assigned to the judge; not an assumption of an undelegated power; not an allowance to a citizen of the United States; or for depredations committed by the Indians; not for a depredation committed by the Spanish government itself, or before the American army entered the province, and so, *coram non judice*, will appear by an examination of the several provisions of the statute compared one with another, and from its body, subject-matter, and context.

These rules of construction are well established by the sages of the law, viz: 1st. It is, undoubtedly, a well established "principle in the exposition of statutes, that every part of a statute is to be considered; and the intention of the legislature to be extracted from the whole."—(Fisher *vs.* Blight, 2 Cranch. 386. Lincoln College's Case, 3 Coke, 59,-b. Co. Litt. 381-a. vi. Bacon's Abr. Statute (1), plea 7, p. 645. Stowell *vs.* Zouch, Plowden, 365.)

2d. "In constructing a statute, we must look to the object in view,

and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction."—(The Emily and the Caroline, 9 Wheat., 388. Vattell, book ii, chap. 17, sec. 282, p. 233.)

3d. An act of Congress ought never to be construed as intending to violate the Constitution, to overthrow fundamental principles, to depart from the general system of laws, or to infract the general doctrines of national law, unless the intention of the legislature be expressed "with such irresistible clearness to induce a court of justice to suppose a design to effect such objects," and no other "possible construction remains."—(Talbot *vs.* Seaman, 1 Cranch, 43. Murray *vs.* Schooner Charming Betsey, 2 Cranch, 118. Fisher *vs.* Blight, 2 Cranch, 390.)

Now to apply these rules of construction.

It has been demonstrated that the faith of treaty requires a judicial proceeding. The act of Congress, in its purview and express declaration, professes its object and design to carry the treaty into effect; the jurisdiction to receive and adjudicate these claims, to assess the amount of satisfaction due for the injuries mentioned in the treaty, and the duty to certify the decisions for the purpose of payment at the treasury, are matters committed by the statute to judges, respectively, of regularly established and pre-existing courts authorized by Congress; the very nature of the duties are judicial, the jurisdiction committed was judicial.

The Constitution of the United States divides and distributes the powers of government between three separate and distinct departments: those which are legislative, to one department; those which are executive, to another; and those which are judicial, to the third department.

"The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. * * * The judicial power must, therefore, be vested in some court by Congress."—(Martin *vs.* Hunter's lessee, 1 Wheat., 329.) It is the duty of each of these departments to abstain from, and oppose any encroachment by, any one department upon either of the others.

By Article 3.—"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress from time to time may ordain and establish." This is imperative. The whole judicial power "shall" be vested in one "Supreme Court," and in such "inferior courts," &c. The Congress cannot vest a judicial power in any but a court, in any but a judicial officer; and that court must be created by the Congress—so say the judges of the Supreme Court in Martin *vs.* Hunter's Lessee, (1 Wheaton, 330, 335) and notes to Hayburn's case, (2 Dallas, 410, 411, 414.)

The Congress and the President of the United States cannot, by their conjoint or separate acts, bill, resolution, or otherwise, authorize the President of the United States to be a justice of the Supreme Court; nor a justice of the Supreme Court to be Secretary of the Treasury; nor the President of the United States to be a judge of an inferior court; and so unite an executive power and a judicial power in one and the same person at the same time; nor give to the President of

the United States the power to entertain an appeal from the decision of an inferior court. Such commixture of executive and judicial powers in one and the same officer is totally incompatible with the principles of a free government, and repugnant to the division of powers between the departments as ordained by the Constitution of the United States.

As an act of Congress to give a power in the Secretary to review and reverse the decision of a judicial tribunal established by Congress, in a matter of a judicial nature, and within the jurisdiction assigned to the judge, would violate the Constitution, and be therefore void, we should not attribute such an intention to the Congress, unless the words of the statute will admit of no other possible construction.

Again: as the 9th article of the treaty requires a judicial proceeding to establish the satisfaction to be made to the Spanish sufferers ; and as the statute expressly professes the purpose to carry the treaty into effect; to construe the statute as giving to an executive officer, the Secretary of the Treasury, the final arbitrament, would be repugnant to the treaty, and to the professed purpose of the statute made to fulfil the treaty.

There is a construction which will satisfy the intention of Congress, expressly declared in the body of the act, which will give effect to every sentence and word of the statute, which will make it comport with the treaty, with the principles of the law of nations, with the elementary principles of jurisprudence, and with the Constitution of the United States.

George III, in the first year of his reign, told the Parliament, from the throne, that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, as most conducive to the honor of the Crown."

Judge Blackstone says: " In this distant and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservation of the public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law ; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by statute of 16 Car. I., c. 10, which abolished the Court of Star Chamber, effectual care is taken to remove all judicial power out of the hands of the King's Privy Council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of State."

To construe the statutes for carrying into effect the ninth article of

the treaty, as giving the Secretary of the Treasury, a minister of State, holding his office at the will of the President, an appellate power to review and reverse the decisions of the judges, would be to impute to the Congress of the United States an intent to retrograde, and to revive the odious composition of the hated Star Chamber, and to violate the vital principles of the Constitution of the United States. Such intention ought not to be imputed to the Congress, and as repeated in the several acts of 1834, 1847 and 1849, made on the same subject, and referring to the act of 1823, unless the words of the statutes will not admit of any other possible construction.

It is a principle of jurisprudence, not merely local, but universal, that the sentence of a judicial tribunal, not having lawful jurisdiction of the subject upon which it professes to adjudicate, is simply void; it confers no right, it bars no right, it concludes no body, nor no thing; all who are concerned in carrying such a sentence into execution are trespassers; all persons in or out of office, who are called to act upon the subject, may treat such a sentence by usurpation as a nullity.—(Elliot *vs.* Piersol, 1 Peters, 340, 341; Thompson *vs.* Tolmie, 2 Peters, 163. Wilcox *vs.* Jackson, 13 Peters, 511. Rose *vs.* Himely, 4 Cranch, 269. Lessee of Hickey *vs.* Stewart, 3 How., 762, 763. 14 Viner, Judgment, (G. a.) pl. 6, (G. a. 2) pl. 3, (G. a. 3) pl. 1, 2, p. 634.)

In Rose *vs.* Himely, (4 Cranch, 269,) Chief Justice Marshall, in delivering the opinion of the court, said: "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined. * * * Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as of the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

In that case, the sentence of a foreign court of admiralty was deemed void, for want of jurisdiction consistently with the law of nations.

It was competent to Congress to direct the Secretary of the Treasury to examine into the jurisdiction of the judge in each particular case, and to be satisfied, before he gave effect to the judgment by paying the money, that the case was within the jurisdiction assigned to the judge; that it was justly and equitably within the provisions of the treaty, viz: that the claimant was a Spanish subject, not a citizen of the United States; that the injury was occasioned by the operations of the American army, and not by the Indians, or by other causes, before the American troops or American agent entered Florida, and so not within the engagement of the treaty.

That the power intended to be given to the Secretary of the Treasury was confined to the question of jurisdiction, and not an appellate jurisdiction to review and correct errors, if the case was properly *coram judice*, appears by these further considerations: the Secretary had no power to enlarge the amount of the judgment, nor to curtail it—he was to pay all, or none—he "shall pay the amount thereof."

Now, this direction is wholly inconsistent with an appellate and revisory power, but consistent with the power to examine into the jurisdiction; and if that was wanting, to declare the judgment totally inefficacious and void.

By paying part of the judgment, the Secretary affirmed the jurisdiction of the judge to hear the evidence, and his right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment is regarded as binding, until reversed by a competent appellate jurisdiction.—(Elliot *vs.* Piersol, 1 Peters, 340, 341. Wilcox *vs.* Jackson, 13 Peters, 511. Hickey's Lessee *vs.* Stewart, 3 Howard, 762. 14 Viner, Judgment, (G. a.) void, or only erroneous, pl. 6, p. 634.) In strict accordance with the principles of these decisions, the act of Congress of 1823 directs that if the Secretary be satisfied the decision is "within the provisions of the said treaty," that then he "shall pay the amount thereof," for the jurisdiction assigned to the judge is coextensive with "the provisions of the 9th article of the treaty with Spain, by which the said Territory was ceded to the United States." The person who penned the act used the adjectives "just" and "equitable," instead of the adverbs "justly" and equitably;" but the after words, "within the provisions of the treaty," with the direction to pay "the amount thereof," to pay the *whole*, or none, explain that it was not an appellate power to the Secretary, but a direction to be satisfied that the decisions were "within the provisions of the treaty"—that is, within the particular jurisdiction by this act assigned to the judges, which jurisdiction was defined by the treaty. As the judges had jurisdiction, by a former act, of all cases arising within their respective jurisdictions, it was necessary and proper in this act to use the words "within the provisions of the treaty," and not the words "within their jurisdiction," which was more extensive than of cases arising under the treaty.

Under this limited authority to the Secretary of the Treasury to examine whether the decisions, certified to him for payment, were or were not within the jurisdiction of the judges, respectively, who gave the decisions, the Secretary of the Treasury, after having affirmed the jurisdiction of the judge, then assumes two powers: the first, a power to review and reverse, in part, the decision of a judicial tribunal, in a matter within the jurisdiction of that judicial tribunal; and secondly, he put aside the law of nations, the law of the treaty, and the law of the land, as to the measure of damages; thereby reversing so much of the judgment as gave interest by way of compensation for the loss of the use of the property, and substituting, in place of the law, a supposed usage of the department, not to pay interest in any case.

These are two palpable errors, plain mistakes, apparent on the face of the proceedings in the first case of the heirs of John Gianopoly, paid in June, 1837; the same errors and mistakes have been followed, and are apparent in all the succeeding cases which have been paid at the treasury.

The extent of the usage of the department was mistaken. It had

not been applied then, nor has it been applied since, to cases of this kind. On the contrary, the department paid interest on claims of this kind in the cases of Major Tharp, O'Sullivan, Otis, Fisher, Sibbald, and the protested draft, before cited. The cases under the treaty, decided by Judge Smith, decreed sums in gross; no interest was mentioned in his decrees; therefore, as to the cases under this treaty, there had been no refusal to pay interest, until Mr. Woodbury applied the rule to the heirs of Gianopoly, paid in 1837. The opinion of Attorney General Taney, in 1831, (i vol. Op. Atto. p. 785,) shows what was, in truth, the usage as to interest, and that Mr. Woodbury mistook the usage when he applied it to the cases arising under this 9th article of the treaty.

Upon the most enlarged construction of the power of the Secretary of the Treasury, contained in the words of the statute, "who, on being satisfied that the same is just and equitable, within the provisions of the treaty," even supposing those words invested him with a full and complete appellate jurisdiction to review the decision of the judge, yet that appellate jurisdiction was, by the statute, to be regulated by the principles of justice and equity applicable to the cases provided for by the treaty, of injuries sustained by the operations of the American army in Florida. He was not absolved from all law. He was not at liberty to apply an unbridled will, in neglect of the rules of justice and equity, generally established, and running in a united course, according to the common law, the civil law, and the law of nations.

The mistake in withholding a part of what was justly and equitably due, which was rightfully adjudged and certified for payment, and which had therefore become a private vested right, cannot be denied; it stands apparent in the body of the records of these proceedings.

The mistake committed by Secretary Woodbury cannot preclude his successors in office; he was bound to have corrected his mistake; that obligation is devolved upon his successors in office.

This is a government of laws, and not of the lawless acts of men in office. No man, howsoever high in office, is above the law. The government is an aggregate of people bound by moral obligations of honesty and justice; associated under a Constitution formed for the purpose of establishing justice; so the preamble to the Constitution of the United States expressly declares. Private property shall not be taken for public use, "without just compensation." The spirit and essence of that rule would be evaded, if private rights could be taken away and forever withheld beyond correction under the color of mistakes in the adjustment of accounts committed by public officers.

The government is bound to be a moral agent; to observe to all and every of its citizens the obligations of right and justice. The officers of the government, in conducting its affairs, are not absolved from those obligations; they have no exemption from the laws, no privilege to withhold private rights by ignorance, carelessness, or mistake; no license for error, unfair dealing, and injustice.

Honest men rectify mistakes committed in the settlement of their accounts, and dishonest recusants are compelled by the courts of justice, upon proof of the mistake, to do what is right and just. The

officers of government, like other men, are liable to fall into mistakes. But they have no privilege to rivet those mistakes beyond correction upon the individuals so wronged.

Government and its officers and agents are bound to rectify mistakes to the prejudice of individuals in adjusting public accounts, just as much as individuals are bound to rectify mistakes committed in the settlement of their private accounts.

The heirs of John Gianopoly have a vested right by judgment against the United States; the whole sum was justly and equitably due from the United States under the terms of the treaty. Mr. Secretary Woodbury, by a mistake, paid only a part, whereas he ought to have caused payment of the whole; the government has a receipt for a part only. An acquittance for part of this sum of money cannot operate as acquittance of the whole judgment. The government has no acquittance for the whole judgment, but only a receipt for so much as was actually paid. The receipt of fifty dollars cannot operate as an acquittance of an obligation for one hundred dollars, "because it is apparent that a lesser sum of money cannot be a satisfaction of a greater."—(Co. Litt. 212 b. Pinnell's case, 5 Co. 117.) On this subject of opening the individual case of the heirs of Gianopoly, and the propriety of paying to them the balance so justly due, and withheld by the mistake of Mr. Secretary Woodbury, I refer to the opinion of Attorney General Legaré, of 4th August, 1842. (Printed Opinions of Attos. Genl. vol. 2, p. 1520,) in the case of William Otis. In that case a mistake occurred in omitting the interest. He was paid the principal sum only, and was required to give and did give an acquittance in full to the government. Upon discovering the mistake, the propriety of opening the case and rectifying the mistake was submitted to Attorney General Legaré. His reasoning appears unanswerable. The "usage" of the Treasury Department, not to pay interest upon these claims under the 9th article of the treaty with Spain, although awarded by the judge, commenced in sheer mistake, in violation of law, and in violation of the treaty, as has been before shown; and, moreover, during the time of this pretended usage, the department has paid to American citizens interest, in other cases similar in principle, although not arising under the treaty. Witness the cases of Major Tharp, 10th Sept., 1831, by Attorney General Taney, (printed Op. Attos. Genl., vol. 1, p. 785;) of O'Sullivan, Atto. Genl. Butler, May 20th, 1837, (same vol., p. 1110;) of the protested draft, Atto. Genl. Butler, 23d March, 1838, (same vol. 1179;) of William Otis, Atto. Genl. Legaré, 4th August, 1842, (vol. 2, p. 1520;) of Sibbald, award of Atto. Genl. Nelson, 30th Sept., 1846, (Exec. Doc. House Rep. 32 Cong., 2d sess, doc. No. 68, p. 27;) of the representatives of George Fisher, Atto. Genl. Toucey, Feb. 13th, 1849, (Op. Attos. Genl., vol. 2, p. 2138.)

Thus the usage of the Treasury Department not to pay interest awarded by the judges to the claimants under the Spanish treaty, has not been without exception in other cases of like kind. The usage of this department, so begun in wrong in 1837, and continued in wrong thenceforth, cannot be binding.

In the case of Money and others *vs.* Leach, in 1765, (3 Burr, 1747,) it was proved that such warrants had been granted and executed at

different times, "from the time of the revolution to the present time, by the principal Secretaries of State." (p. 1747.)

Per Lord Mansfield, (p. 1767 :) "It is said that the usage has been so, and that many such have been issued since the revolution, down to this time."

"But a usage to grow into law, ought to be a general usage, *communiter usitata et approbata;* and which, after a long continuance, it would be mischievous to overturn.

"This is only the usage of a particular office, and contrary to the usage of all justices and conservators of the peace."

"There is the less reason for regarding this usage, because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed after that law was expired."

Per Justices Wilmot, Yates, and Aston: "No degree of antiquity can give sanction to a usage bad in itself." The judges were clear and unanimous that the warrants were illegal and void.

This usage commenced by Secretary Woodbury was bad, in violation of the common law, the public law, the treaty, and the statute to carry the treaty into effect. No degree of antiquity could give sanction to such a usage, much less the practice of a particular department, so interrupted by the payment of interest by way of damages in other like cases, and contrary to the usages of the justices of the Supreme Court of the United States, and of the judges and justices of the courts of the several States. *Mala praxis abolendum est.*

The faith of the government, the principles of the law of nations, the principles of the common law, the principles of right and justice, established and used from time immemorial, and of universal obligation, all concur in proving this practice of the Secretary of the Treasury to have been illegal in its commencement and its continuance, and demand that it be abolished. The evil would be in its observance, not in demolishing it, thereby to subserve the public faith, the principles of the law of nations, and the obligations of justice and equity.

The maxim "*stare decisis*" is venerated in courts of justice, but not with a blind, absurd, idolatrous devotion. The Supreme Court of the United States have refused to follow erroneous precedents, and corrected mistakes in former adjudications. So have judges of the King's Bench. Chancellors have corrected their own decrees and those of their predecessors in office for errors apparent in the body of the decree.

Gaudent sapientes errores corrigere, fatuæ nunquam. The idea that a mistake, when committed, must remain uncorrected and perpetual, is without reason, and has no text of law to give it countenance.

The usage not to pay that part of the damages assessed by the judge, consisting of interest for loss of the use of the property destroyed, was illegal in the beginning, illegal in its continuance. It is not supported by any judicial decision to be found. It stands alone, blasted by reason and by judicial decisions, at home and abroad, of the highest authority, like a solitary oak blasted by the lightnings of heaven. Its continuance in the Department of the Treasury for some

fourteen or fifteen years cannot repeal the statutes and treaty of the United States and the law of nations. It binds no body. The rule of the law and of the treaty ought to prevail.

IV. Question fourth is without difficulty. The Congress of the United States have again and again manifested their intention to carry into effect this 9th article of the treaty with Spain. They have furnished to the executive, without stint, the necessary means to preserve the public faith pure and undefiled.

The several acts, before cited, of 1823, 1834, 1847, and 1849, *in pari materia*, show the continued desire and intention of the Congress to fulfil the treaty with the most scrupulous good faith, leaving no just cause of complaint to any Spanish sufferer. The appropriation of money to pay the claims, made by the acts of 1823 and 1834, are as unlimited in amount and duration, as long, as high, as deep, as wide as the 9th article of the treaty.

The act of 3d March, 1849, in giving relief to those claimants who had not presented their petitions to the judge, refers to the act of 1834, which act refers to that of 1823, and so all these acts are as one act. As late, therefore, as 3d March, 1849, the Congress repeated their desire, their intent to have the 9th article of the treaty fulfilled, and again referred to the former appropriation for that purpose. What more can the Treasury Department desire the Congress to do? Is the Congress to assume the judicial and the executive powers also, so that the entire process of fulfilling this 9th article of the treaty shall be the work of Congress?

Why should the Secretary of the Treasury hesitate to apply the means already furnished by Congress to carry into effect this 9th article of the treaty.

The aggregate of the sums awarded by the judges to the respective claimants, which have been withheld under this illegal usage of the department, is about $1,000,000. What then? Suppose it were five millions. That cannot change the terms of the treaty, nor the meaning of the statutes to carry into effect this 9th article of the treaty, nor justify the government of the United States in withholding the due execution and fulfilment of this article.

By the treaty we acquired the two Floridas; adjusted the disputed boundary of Louisiana; united the Spanish claim to Oregon to our own, thereby the better to adjust the disputed boundary in that quarter between us and Great Britain; we obtained a renunciation of the Spanish government for the national wrongs by the operations of our armies in the Floridas from 1812 to 1819, and adjusted mutual reclamations of long standing.

We have received the considerations promised us by Spain in the treaty of 1819, and cannot, in good faith, refuse the indemnities which we promised to the Spanish officers and the Spanish inhabitants for the individual wrongs suffered by them by the operations of our army in the Floridas.

We cannot now go behind the treaty to make a new agreement, nor discuss the questions how far we had cause for invading the Spanish territory in this or that year. All that was discussed by our negotiator, and adjusted by the treaty of 1819. We cannot, in good

faith, levy upon any of the Spanish officers, or individual Spanish inhabitants, by way of set-off, for any wrongs supposed to have been committed by the Spanish government antecedent to the treaty of 1819. By that treaty we are estopped and bound, and we must fulfil the 9th article.

While the Congress of the United States have promptly provided the means, and have repeatedly manifested their desire that this 9th article should be carried into full effect, it cannot be disguised that the Department of the Treasury has been hanging back, and giving interpretations to the treaty and the acts of Congress, in a manner which sticks in the word and eludes the sense. Good faith affixes itself to the intention. Bad faith resorts to the letter.

The Plateans promised the Thebans to restore the prisoners, but put them to death, and restored their dead bodies. Labeo agreed with Antiochus to restore half his fleet, but caused the ships to be sawed in half, and then restored them. Rhadomistus swore to Mithridates not to employ steel or poison against him, then caused him to be smothered in a heap of clothes. Cleomenes concluded a truce with the people of Argos for a certain number of days; before the expiration of the time, finding the people asleep, relying on the faith of the treaty, he fell upon them in the night, killed a part, and made the rest prisoners, pretending that nights were not included in the truce.—(Grotius, book ii, chap. xvi, sec. 5, p. 355. Tacitus, by Murphy, vol. 2, sect. 47, p. 336. Puffendorf's Law of Nature and Nations, book v; chap. xii, sec. 3, 18, Vattell, book ii, chap. xvii., sec. 273 to 291, pp. 249 to 259.)

Of such subterfuges, Cicero remarks, "the fraud does but aggravate, not absolve, the fault." *Fraus enim adstringit, non dissolvit perjuriam.*—(De Offic., book iii, chap. xxxii.) The Congress of the United States intended no cunning interpretations.

The arrearages of the damages assessed by the judges, withheld at the treasury, amount to about a million of dollars. Ay, there lies the rub. Is the public faith of the United States to be bartered for a million of dollars? Our forefathers paid the debt of the revolutionary war, with interest; left us a precious inheritance, a good name, fame, and credit among the nations of the earth. Shall we, like Esau, sell our birth-right for a mess of pottage? Our treasury is not in such need as that we must keep money at such enormous price.

There are circumstances relating to our own affairs, and to future events hanging upon the present aspect of affairs in Europe, that we should bring to mind.

The United States have insisted upon the rule of damages (which was allowed to Spanish subjects by the judges adjudicating under the 9th article of the treaty with Spain) not only with respect to depredations committed on our citizens by other nations, but in respect to Spain in particular, under the treaty of 1795, as before stated. Spain paid damages according to that measure.

We have an affair of like kind with Spain, about the "Black Warrior." I find among the papers a letter from Secretary Clayton, of the Department of State, of 4th December, 1849, to the Attorney General, respecting the application of the Spanish minister, (his

excellency M. De Calderon,) claiming, "in behalf of Spanish subjects, the fulfilment of the 9th article of the treaty with Spain." In addition to this, it is to be remembered that, in relation to this treaty of 1819, we insisted on the abrogation of the grants, by Spain, to the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargos, for lands in Florida, as having been made by Spain under circumstances of unfairness; and the grants were revoked by the King of Spain in his ratification, which caused a dely of the ratification for about two years. These are circumstances which call for correction of the errors and mistakes which have so long delayed the full, just, and faithful execution of the 9th article of the treaty; which mistakes, however venial, as proceeding from pure motives on the part of those who committed them, have nevertheless given rise to imputations of bad faith in the government of the United States. As they are, in truth, errors and mistakes, palpable, and apparent in the record of the proceedings, it is proper, *ex debito justitiæ,* and also for the honor of the government of the United States, that the mistakes be corrected as soon as practicable.

Another consideration of enlightened public policy demands the correction above mentioned. The United States have heretofore claimed, uniformly, for their citizens, that measure of satisfaction for injuries suffered in the pursuit of their neutral, lawful commerce. It is the rule known in the law of nations, established by eminent writers on the public law, and by the highest judicial decisions. We must not place ourselves in the condition of having repudiated that rule of satisfaction. Considering the gathering storms of war, threatening to burst upon the nations of Europe, we have but too much cause to apprehend that, in time to come, as in times past, we shall have multiplied causes for claiming indemnities to our own citizens for injuries to their property engaged in neutral, lawful commerce.

Let us do justice, and then we may firmly insist that justice be done unto us. Let us do unto others as we would have others to do unto us.

In conclusion, my opinions are:

That the claim of Reddin Blunt, and of others of the same class, are just and equitable within the provisions of the treaty:

That the decision of Mr. Secretary Woodbury, in refusing to pay interest, as awarded by the judges, was a palpable mistake; in violation of the treaty; in violation of the principles of the common law, the civil law, and the public law; in contravention of the decisions of the Supreme Court of the United States in similar cases; that the usage alluded to by Secretary Woodbury did not apply to that class of cases; that the interest, as awarded by the judges in the class of cases within the 9th article of our treaty with Spain of 1819, was within the measure of damages properly applicable to such cases, and universally acknowledged:

That the usage of the Treasury Department, not to pay the interest so awarded by the judges in that class of claims, was illegal in the beginning, illegal in its continuance, in violation of the treaty, in violation of the law of nations, in violation of the law of the United

States; that no degree of antiquity could sanction such a usage, bad in itself, much less the usage of a particular office, contrary to the usage of the justices of the courts of the United States and of the courts of the several States; that such illegal usage binds no body, and ought to be abolished; that the mistakes committed in so withholding the respective sums of interests awarded by the judges to the claimants under the 9th article of the treaty, from the case of the heirs of Gianopoly down to this time, ought to be corrected:

That the appropriations by Congress, in the acts of 1823 and 1834, are unlimited as to time and sum, except so far as is necessary to pay the awards of the judges under the 9th article of the treaty:

That the acts of 1823, 1834, 1847, and 1849, *in pari materia*, manifest the original and continuing intent of the Congress of the United States to cause the 9th article of the treaty to be fulfilled, in good faith, and without cavil:

That sound and enlightened public policy requires that the Secretary of the Treasury cause these mistakes to be corrected, and the 9th article of the treaty to be fulfilled without further delay:

For, "on the observation and execution of treaties, depend all the security which princes and States have with respect to each other, and we can no longer depend on conventions to be made, if those that are made are not maintained."

GEO. M. BIBB

To the ATTORNEY GENERAL.

MARCH, 1854.

APPENDIX.

The decision of the Supreme Court of the United States in the case of Ferreira (13 Howard, 45,) is an example that wise men are not wise at all times. *A liquando dormitat bonus Homerus.* The principles of that opinion cannot stand.

The decretal order shows that the case is "dismissed for want of jurisdiction." Yet, without jurisdiction, the court have given an elaborate opinion upon points in a case whereof they had no jurisdiction. Of course, the opinion must be an *obitur dictum*, of no binding authority. In Marbury *vs.* Madison, (3 Cranch, 332,) the court gave an elaborate opinion in a case whereof they had not cognizance. President Jefferson and Secretary Madison treated the opinion as a nullity, and did not deliver the commission to Marbury.

Documents showing that the Florida claims, as treaty cases, are governed by the laws and usages of nations, and that they have never been considered by the Treasury Department with reference to those laws and usages. Also, report of the Judiciary Committee, unanimously adopted by the Senate, showing that the existing laws are sufficient to pay the entire amount of the decrees of the Florida courts.

The Attorney General of the United States, in his recent opinion upon the Florida claims, under the 9th article of the treaty of 1819 with Spain, admits that the *measure of damages* adopted and applied by the Florida courts is the proper one, under *the laws and usages of nations*. His language is as follows:

"Considered, however, as a general question depending on principles of law, I confess I am now strongly inclined to concur in the opinion of Mr. Wirt, that indemnification, or satisfaction, for property illegally taken or destroyed, includes not only its value, but *interest* upon that value, as an equivalent for the loss of the *use* of that property; and I should probably advise you, in the particular cases now before you, to adopt that measure of compensation, if a different rule, in respect to the allowance of interest in the same class of cases, had not been so thoroughly and long established in your department as to make it, in my judgment, binding upon you."

The language of Mr. Wirt, as quoted by Mr. Crittenden, is as follows: "That the interest, *according to the usage of nations*, is a necessary part of the just indemnification awarded by the Emperor of Russia."

The Attorney General also admits that these cases, *as treaty cases*, are governed, exclusively, by *the laws and usages of nations*, and not by any *municipal law or usage*. His language is as follows:

"If this" (a resort to our municipal laws or usage) "were permitted, then the *lex loci* of one of the parties, unkown, perhaps, to the other, would be made to govern the meaning of *treaties*, in violation of the *most indisputable principles of the public law*. THE COMPACTS OF NATIONS can be governed *only* by THE LAWS OF NATIONS; and these require that the language of such compacts should be interpreted according to its proper general sense, as understood by the civilized world, and regardless, of course, of any different or special signification which *local law* or *local usage* may have given to any of its words or terms."

The following papers will show that *no one* of these claims has ever been decided at the Treasury Department under "*the laws and usages of nations*," which the Attorney General now declares *alone* govern them; but that they have been uniformly decided under the mere *municipal usage* of the Treasury Department in domestic cases, which the Attorney General declares to be totally *inapplicable* to such *treaty cases:*

Letter of Mr. Sherman to the Secretary of the Treasury.

WASHINGTON, *July* 14, 1851.

SIR: I will thank you to inform me whether the right of any of the claimants under the 9th article of the treaty of 1819 between the United States and Spain to the *interest* decreed by way of damages by the Florida judges has ever been decided by the department under and by *the laws and usages of nations?* or whether, on the contrary, the right of the claimants to such interest has not uniformly been decided under the *usage of the Treasury Department*, in domestic cases, not to pay interest unless expressly authorized by Congress? This information is wanted to be used in cases now pending before the honorable Mr. Graham, Secretary of the Navy, acting as Secretary *ad interim* of the Treasury.

I have the honor to be, very respectfully, your obedient servant,

CHARLES E. SHERMAN, *Attorney.*

The SECRETARY OF THE TREASURY.

Letter from Mr. McClintock Young, late chief clerk of the Treasury Department, to Mr. Secretary Corwin.

WASHINGTON, *September* 16, 1851.

SIR: In reply to Mr. Harrington's letter of the 12th instant, enclosing to me the letter of C. E. Sherman, esq., addressed to the department on the 14th of July last, I have the honor to state that, so far as I had any agency in acting on the Florida claims, under the act of Congress of 1834, my reports to the Secretary of the Treasury, in relation to interest, were founded on the practice and usage of the department in relation to *domestic* claims.

The question as to the action of the department being governed by the "*laws and usages of nations*," was never presented to me, whilst I was required to report on the awards made by the judge in Florida; and I am not aware that such question was ever raised, or ever thought of, whilst I was required to act on the claims of the inhabitants of Florida, under the treaty with Spain, as required to be decided by the Secretary of the Treasury by virtue of the act of 1834.

The question of interest, as far as I have any knowledge, was uniformly decided under the "usage of the Treasury Department in domestic cases;" that is, "not to pay interest unless expressly" or impliedly "authorized by Congress."

It is proper to state, that for the last two or three years before I left the Treasury Department I was relieved from any action on those claims, and I therefore cannot speak positively whether this question, as to the operation of the "laws and usages of nations," was brought before the department, with respect to its decisions, on these claims.

I speak confidently, however, when I assert that during the whole

period of the administration of the late lamented Mr. Woodbury, and of several of his successors, whilst I had to examine such claims, the first question asked by Mr. Sherman was never entertained by any of them, or by the subordinate officers of the department, who had, in the first instance, to report on the awards of the judge, under the acts of Congress.

I again repeat, that we considered we were bound by the universal rule respecting interest on domestic claims; and there can be no doubt, that, in coming to this conclusion, we were misled by the fact that nearly all of the claimants became citizens of Florida after its cession to the United States.

I am, very respectfully, your obedient servant,

McCLINTOCK YOUNG.

Hon. THOMAS CORWIN,
Secretary of the Treasury.

P. S. Mr. Sherman's letter is herewith enclosed.

Report of Mr. Harrington, chief clerk of the Treasury Department, to Mr. Secretary Corwin.

I certify that the practice of the department in regard to the Florida claims, for losses in 1812 and 1813, has not been changed since the late chief clerk, Mr. Young, resigned the charge thereof; they have been treated as "domestic claims," and therefore the application of the "laws and usages of nations" has never been made nor taken into consideration in the decisions of the department thereon.

GEORGE HARRINGTON, *Chief Clerk.*

TREASURY DEPARTMENT, *September* 23, 1851.

Letter of Mr. Secretary Corwin to Mr. Sherman.

TREASURY DEPARTMENT, *September* 23, 1851.

SIR: In reply to your letter of the 14th July last, respecting the course pursued by this department in deciding upon the awards made upon the claims under the 9th article of the treaty of 1819 between the United States and Spain, I transmit herewith, for your information, copy of a report by Mr. McC. Young, late, and for many years the chief clerk of this department, with the certificate of the present chief clerk, by which it appears that its decisions were not governed by the laws and usages of nations

Very respectfully, your obedient servant,

THO. CORWIN,
Secretary of the Treasury.

CHARLES E. SHERMAN, Esq.

Letter of Hon. J. C. Spencer, late Secretary of the Treasury, to Mr. Sherman.

ALBANY, *September*, 5, 1850.

SIR: In answer to your inquiries respecting the grounds of the decisions of the Treasury Department, while occupied by me, upon the construction of the 9th article of the treaty with Spain of the 22d February, 1819, and of the acts of 3d March, 1823, and of the 26th of June, 1834, in execution of that article of the said treaty, I have refreshed my recollection by the examination of the correspondence of the department with the Attorney General, and feel able to speak with considerable confidence upon the points to which my attention has been particularly directed.

I am quite sure, that, in considering the power of the Secretary to revise the decisions of the judges in Florida upon claims under the above acts, I did not take into view the question whether the measure of compensation for losses was to be fixed according to the rule prescribed by the *law of nations*, but rather regarded it as a question arising under our acts of Congress, and to be decided upon the same principles that would govern in cases of claims by our own citizens upon our own government.

Whatever decision I made upon the question of interest on the Florida claims, had reference to prospective interest accruing after the award was made, or to the allowance of interest *eo nomine*, and not as a measure of compensation at the time of the award for the loss of property. And so far as my decisions may be quoted, they ought not to have any bearing on either of the points herein stated.

If I were now to give an opinion, I should say, unhesitatingly, that the rule of compensation in the above cases should be obtained from the stipulations of the treaty with Spain, exclusively, and that such rule should govern the *department* as well as the *courts*.

Respectfully, your obedient servant,

J. C. SPENCER.

C. E. SHERMAN, Esq.,

The closing paragraph of the opinion of Mr. Attorney General Nelson, to whom Mr. Spencer referred one of these claims, fully sustains the statements of his letter. It is in the following words:

"I do *not* mean to say that, upon the principles of a broad and liberal equity, the present claimant may not be entitled to *interest* upon his demand. *That is a question upon which I express no opinion.* All that I intend to urge is, that *under the established* USAGE OF THE TREASURY DEPARTMENT, over and again sanctioned by the law officers of the government, the Secretary has no authority to allow it."

In a recent letter of Mr. Nelson, on file among the papers of these cases, he fully affirms the legality and justice of the measure of damages, including the interest, awarded by the Florida judges in these cases, and says he *subsequently* allowed it in a *domestic case* for injury to property.

A reference to Mr. Crittenden's opinion of 1841, in these cases, will show that that opinion was given under the mere *usage* of the Treasury Department in domestic cases, and without any reference whatever to the *treaty*, the *laws of nations*, or even the act of 1823.

Letter of Hon. G. M. Bibb, late Secretary of the Treasury, to the Hon. William Cost Johnson.

WASHINGTON, *June* 28, 1851.

DEAR SIR: In answer to your letter of this month, I can say, without hesitancy, that in the orders which I gave whilst Secretary of the Treasury for payment of the claims adjudicated by the judge in Florida, under the act of Congress of 1834, for indemnity to a Spanish subject for losses sustained by the operations of the American troops in Florida in 1812 and 1813, that no attorney for the claimant appeared, or furnished any statement or argument as to rule of damages. The question as to rule of damages under *the law of nations*, and the treaty of 1819 between the United States and Spain, was not presented to my mind, was not considered by me, was not intended to be decided by me, in making the orders for payments without interest. In so ordering, I signed an order drawn up by one of the clerks according to form which had previously been observed in like cases.

The question of interest upon the value of the property destroyed at the time of the trespass, by way of compensation for the deprivation of the use of the property, was not considered nor adjudicated by me in these cases, but passed *sub silentio*.

If the question had been stirred, I feel confident that I would not have committed so great a blunder as to have decided that, under the treaty, and the acts of Congress to carry into effect the treaty between the United States and Spain, an allowance of interest, at the legal rate of the country where the trespass in violation of the laws of nations had been committed, was not to be paid by the United States as a just compensation for deprivation of the use of the property valued at the time of the trespass.

Respectfully yours,

GEO. M. BIBB.

Hon. WM. COST JOHNSON.

The full concurrence of Mr. Forward and of Mr. Ewing, two of the Secretaries who have acted on these claims, in the statements of Mr. Spencer and of Judge Bibb, will be shown by their papers on file in these cases; and that of Mr. Secretary Walker, by the questions propounded by him to the Attorney General, under *the treaty and the laws of nations;* and that of Judge Woodbury, by the foregoing statement of Mr. Young, his chief clerk.

Opinion of the Hon. Daniel Webster.

I have carefully examined the opinions given by Mr. Crittenden, Mr. Legaré, and Mr. Nelson, upon the claims arising under the 9th article of the Florida treaty of 1819, and the acts of Congress of 1823 and 1834, passed to carry that article of the treaty into effect, and my opinion is:

1st. That neither of those opinions answers, or involves the questions referred by Mr. Secretary Walker for the opinion of the Attorney General on the 28th of February, 1849.

Neither of those gentlemen expresses any opinion as to the legal effect of that clause of the treaty which required the claims to be "*established by process of law;*" nor any opinion as to the obligations of said article of the treaty, or the measure of redress for which it called, under the public law; nor whether the measure of "satisfaction" decreed by the courts in these cases was conformable to the obligations of the treaty.

Mr. Crittenden seems to have confined his attention exclusively to the act of 1834, without any reference to the treaty, the public law, or the provisions of the act of 1823; and he thinks the court had no authority to allow interest *eo nomine*, and as such under the word "losses" in that act. But the question is, not whether the judge might lawfully decree interest *eo nomine;* but whether he was authorized to consider it as an equitable measure of damages, under the treaty and the public law, in connexion with the act of 1823, which authorized him to decide according "to the provisions of the treaty?"

In considering the power of the Secretary to review the decisions of the courts, no one of the gentlemen who gave these opinions took any notice of that distinct provision of the treaty which required the claims to be "*established*" by "process of law;" nor of that provision of the act of 1823 which made the decisions of the judge, *rejecting* claims, final and conclusive upon the claimants, by prohibiting them from being sent to the Secretary.

2d. I have also examined both of the acts of Congress above referred to with care, and entertain no doubt that the Secretary's power and duty to make payment are coextensive with the provisions and obligations of the treaty under the public law.

The 9th article of the treaty places all the claims embraced by it upon the same footing; and I think it manifest that Congress intended they should all be adjudged and paid by one and the same standard of judgment and payment; and that it could not have been intended to authorize the allowance of interest, by way of damages, under the act of 1823, if required by the "provisions of the treaty," under the public law, and to exclude it, under the merely descriptive word "losses," in the act of 1834; the acts being *in pari materia*, and the undoubted purpose of both a full and complete execution of the treaty Such a construction would involve the compound absurdity of establishing *two* standards of *judgment* upon the same class of claims whilst the obligations of this government were precisely the same a, to the whole class, and, at the same time, but *one* rule of payments to wit: the "provisions of the treaty;" thus authorizing the *Sec*

retary to *pay* interest as to the whole class of claims, if the treaty and the public law required it; but refusing authority to the *court* to *adjudge* it, as to a portion of them, even if required by the treaty and the public law.

In 2 Cranch, p. 64, the Supreme Court of the United States declared that—

"An act of Congress ought never to be construed to violate the law of nations, if any other *possible* construction remains."

The same doctrine is laid down, by the same court, in the case of Talbot & Seaman, 1 Cranch, p. 1. The language of the court is as follows:

"The laws of the United States ought not to be construed, if it can be avoided, so as to infract the common principles and usages of nations, or the general doctrines of national law."

This is, undoubtedly, the true rule; and even if the Secretary *were* authorized to revise the decrees of the courts, there can be no doubt that the obligations of the treaty, under the public law, should be adopted as the standard of his judgment.

The act of 1834 provides no rule of judgment for the courts. That of 1823 does; and expressly requires the courts to decide "*agreeably to the provisions of the 9th article of the treaty.*" These being laws *in pari materia*, the merely descriptive and indefinite words "claims for losses in 1812 and 1813," in the act of 1834, cannot, upon any sound principle of legal construction, be construed to control the express and positive rule of adjudication prescribed by Congress in the act of 1823."

No one of the opinions intimates any want of authority in the Secretary of the Treasury, under the 2d section of the act of 1823, to pay interest, if the treaty and the public law require it. Upon that question, which appears to be now, for the first time, presented, and on which alone the merits of these claims depend, so far as the Secretary's power of payment is involved, no opinion whatever was given. On the contrary, the *only* opinion, as to the want of power in the Secretary to pay interest, is predicated, expressly and exclusively, upon the USAGE of our own executive departments in domestic cases, without any reference whatever to the treaty, the public law, or the 2d section of the act of 1823, which expressly authorizes and requires the Secretary to pay the decrees, when "within *the provisions of the treaty.*"

I therefore think there are no valid grounds to question the authority, or duty, of the Secretary of the Treasury to pay the *entire* amount of the decrees of the courts in these cases, under the above named acts of Congress.

My judgment is clear that the opinions heretofore given furnish no answer to any of the questions submitted by Mr. Secretary Walkery that they do not reach the legal merits of these claims; and that the; present no bar or obstacle to an opinion by the present Attorney General, on the questions now submitted.

DAN'L WEBSTER.

APRIL 6, 1849.

[The full opinion of Mr. Webster, under the above date, showing—

1. That the Florida claims, as *treaty cases*, are governed by the *laws of nations*, and that the treaty requires them to be *judicially* established;

2. That, under those laws, the measure of damages decreed by the Florida courts is the only legal one *for injury to property;*

3. That, under the acts of Congress, the Secretary of the Treasury is bound to pay the *full amount* of the said decrees, on cases *found to be within the treaty*—is on file with the papers in these cases.]

A refusal to pay the claims now presented and pending before the Secretary of the Treasury will therefore be a clear violation both of the treaty and the acts of Congress passed to carry it into effect, *without any* PRECEDENT *whatever* to justify such refusal, since decisions, *made under a law admitted not to be applicable*, cannot, upon any known legal principle, be set up as *precedents* to prevent a decision *under the law admitted to be applicable to these claims.*

"A precedent in law, or, as it is called, a *legal precedent*, is a decision arrived at after patient inquiry into *all points* bearing upon the doubtful subject, by an impartial judge, who stands between or above the two parties, and is removed beyond the circle of interests within which the two litigating parties move. * * * * *

"*Executive acts* ought never to be considered as *precedents* by any but the inferior executive officer; and he, too, must be conscientiously convinced that the first act was not against the *law*. If we were to take every executive act as a precedent, and a justification of similar subsequent ones, it would be *monstrous*, and subversive of the very principles of a free government. The legal precedent is a decision between parties, but in this case the executive itself forms a party."—(*Lieber on Precedents*, 18 *vol. American Jurist*, 286, 293.)

In the case of *Tracey and Balestier vs. Swartwout*, 10 *Peters*, 95, the Supreme Court says: "The *Secretary of the Treasury* is bound by *the law;* and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to that law, yet *neither he, nor those who act under him, can dispense with, or alter any of its provisions.*"—(See, also, *Elliott and Swartwout*, *Ibid.*, 153.)

"*Precedents* are the decisions of *courts of justice*. To render precedents valid, they must be founded in *reason* and *justice*, Hob. 270; must have been made upon *argument*, and be the solemn decision of the *court*, 4 Co. 94."—(*Bouvier's Law Dict.*, *title Precedent*, *p.* 349.)

"Judgments are not, as formerly, silent oracles which require a passive obedience; their irrefragable authority, for or against those who have obtained them, is submitted to the censure of reason, when it is pretended to set them up as rules to be observed *in other similar cases.*"—(*Ibid.*, *title Reason*, *p.* 408.)

"The doctrine of *stare decesis* is not always to be relied upon, for the courts find it necessary to overrule cases which have been *hastily decided, or contrary to principle.* Many hundreds of such overruled cases may be found in the American and English books of reports."—(*Ibid.*, *p.* 525, *title Stare Decisis.*)

See, to the same effect, 1 Kent, 476, where that learned author also says:

"It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be *examined without fear, and revised without reluctance*, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed *by the perpetuity of error*."

The same author, (Chancellor Kent,) after stating the frequency with which Lord Mansfield overruled erroneous decisions of his predecessors, says: "His successor, *Lord Kenyon*, acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield as *dangerous innovations*, and on the ground that they had departed from the precedents of *former* times, and disturbed the *landmarks of property*, and had unauthorizedly superadded equity powers to a court of law. 'It is my wish and my comfort,' said that venerable judge, 'to stand *super antiquas vias*. I cannot legislate, but by my industry I can discover what our predecessors have done, and I will tread in their footsteps.' "—(1 *Kent's Com.*, 477.)

Lord Kenyon uses this language *while overruling the erroneous decisions of his predecessor*, Lord Mansfield, and re-establishing the true principles of the law. The Secretary of the Treasury will but *follow* this example of Lord Kenyon, by overruling the *recent* erroneous decisions of his predecessors, made under the inapplicable *usage* of the Treasury Department, and maintaining the true principles of the public law applicable to these cases, as laid down and established by the executive and judicial departments of this government, from its origin, in all similar treaty cases; while, at the same time, he will sustain the true interest and policy of the United States as a great commercial nation.

The acts of Congress require these claims to be *adjudged* and *paid* according to "the provisions of the *treaty*." If "the provisions of the treaty," and its just obligations under the laws of nations, therefore, require the payment of the interest decreed by the courts, as the legal and proper measure of the claimant's damages, then the *acts* necessarily require such payment, since they expressly make the treaty the governing law.

The following memorial to Congress, and report of the Judiciary Committee of the Senate, *unanimously adopted by the Senate* at its last session, fully affirm the sufficiency of the acts already passed, to authorize the payment of whatever the treaty requires:

[*Memorial to Congress.*]

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled:

The undersigned begs leave respectfully to represent to your honorable bodies, that he is a claimant, under the existing treaty between

Spain and the United States, for the indemnity stipulated by that treaty in his behalf, and that of other subjects of her Catholic Majesty, for the spoliations committed by the troops of the United States upon the inhabitants of Florida anterior to the cession of that Territory by Spain to the United States.

That by that treaty the United States stipulated to "cause satisfaction to be made for the injuries, if any, which, by *process of law*, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

That for the purpose of carrying the said stipulation into effect, the Congress of the United States have passed two acts, one dated the 3d March, 1823, entitled "An act to carry into effect the ninth article of the treaty," &c., and the other the 26th June, 1834.

That by these acts the judicial tribunals which were to ascertain, *by process of law*, the injuries which had been sustained, were designated and required to adjust or "adjudge" the claims agreeably "*to the provisions of the treaty;*" and provision was therein made for the payment of the said claims which should be so established.

That the claim in which your memorialist is, with others, interested, has been so *established* by the final decision of the judicial tribunal designated by the said acts of Congress; and yet, notwithstanding, whether from a misinterpretation of the acts before referred to, or from whatever other cause, the same has been only paid in part, and the payment of the residue has been hitherto refused or delayed, although the terms of the treaty are explicit, and its fulfilment has been urged by the minister plenipotentiary of her Catholic Majesty.

Wherefore, and in consideration of the premises, your memorialist respectfully prays the Congress of the United States to pass whatever additional act may be necessary to carry the said treaty into full and complete effect, or, by a declaratory act or resolution of your honorable bodies, to affirm the sufficiency of the existing laws to authorize and require the Secretary of the Treasury to pay *the full amount of the judgment* rendered in behalf of the estate in which your memorialist is interested by the judicial tribunal designated by the said acts; and your memorialist will ever pray, &c., &c.

EDMUND DE PESTRE,

In behalf of himself, J. D. Bellechasse, and the other legal representatives of John Forbes, deceased, by his agent and attorney,

CHA. E. SHERMAN.

WASHINGTON, D. C., *February*, 1851.

OFFICE OF THE SECRETARY OF THE SENATE U. S.,
March 17, 1851.

I certify that the foregoing is a true copy of the original memorial of Charles E. Sherman, agent and attorney, &c., on file in this office.

ASBURY DICKINS,
Secretary of the Senate.

[*Action of the Senate.*]

IN SENATE OF THE UNITED STATES, *February* 24, 1851.

Submitted and ordered to be printed.

Mr. DOWNS made the following report:

The Committee on the Judiciary, to whom was referred the memorial of the legal representatives of John Forbes, deceased, ask leave to submit the following report:

The claim of the memorialist is founded on the 9th article of the treaty of 1819 between the United States and Spain; on the several acts of Congress of the 3d March, 1823, and of the 26th June, 1834, passed to carry the same into effect; and on the judgment of the superior court of East Florida, rendered under the authority of the said acts.

The 9th article of the treaty stipulates that "the United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In compliance with this stipulation of the treaty, which provided for the ascertainment of the injury by process of law, the acts of 1823 and 1834 authorized and directed the judges of the superior courts of Florida to receive and adjust "all claims arising within their respective jurisdictions, agreeably to the provisions of the 9th article of the treaty; and when the decisions were favorable to the claimants, to report the same to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the treaty, was required to pay the amount thereof to the person or persons in whose favor the same was adjudged."

Entertaining the opinion that these acts, intended to carry into effect the provisions of the treaty, are adequate to furnish relief co-extensive with the obligations thereof, and that no additional legislation is necessary, the committee ask to be discharged from the further consideration of the subject.

IN SENATE OF THE UNITED STATES,
February 24, 1851.

Mr. Downs, from the Committee on the Judiciary, to whom was referred the memorial of the legal representatives of John Forbes, deceased, submitted a report, which was considered by unanimous consent; and, in concurrence therewith,

Ordered, That the Committee on the Judiciary be discharged from the further consideration of the subject.

Attest: ASBURY DICKINS,
Secretary of the Senate.

That such action *by one branch of Congress* is entitled to great weight, see the decision of the Supreme Court in the case of Kendall and Stokes, 12 Peters, 612, where they say: "After such a decided expression of the opinion of *one branch of Congress*, it would not have been necessary to apply to the other."

The *first* rejection of the interest at the treasury was in 1836, and without argument; and the right of the claimants to said interest was treated as an *open question* by *every administration*, down to the time when Mr. Secretary Walker made the pending (and *first*) reference under the treaty and *the laws of nations*.

W. COST JOHNSON,
CHA. E. SHERMAN,
Attorneys.

WASHINGTON, *September* 27, 1851.

Statement of the cases of the "Encomium" and "Comet," vessels of the United States cast by stress of weather upon the British West India Islands (Bahamas,) on their voyage to New Orleans, with slaves on board, and which slaves were seized and liberated by the colonial authorities, and for which the government of the United States claimed indemnity or satisfaction, in behalf of the owners of said slaves, from the British government.

The documents in these cases were communicated to Congress by President Jackson, under date of February 14, 1837, and by President Van Buren, under dates of the 13th February, 1839, and January 27, 1840.

(*Vide* Senate doc., 2d sess., 24th Congress, No. 174. Senate doc., 3d sess., 25th Congress, No. 216. Senate doc., 1st sess., 26th Congress, No. 119.)

The correspondence between the two governments commenced in 1831, and terminated in 1839.

The United States claimed of the British government the return of the said slaves, or a just and reasonable indemnity for their detention and loss to the owners.

The instructions to our ministers to Great Britain were given by Mr. Livingston and Mr. Forsyth; and the correspondence was carried on in behalf of the United States by Mr. Vail, Mr. Van Buren, and Mr. Stevenson, our ministers to Great Britain.

The correspondence in behalf of the British government was carried on by Lord Palmerston, secretary of foreign affairs to that government.

The obligation of the British government to restore said slaves, or make compensation for them, was at first resisted, but subsequently conceded; and this point being settled, the distinct question arose as to the amount and measure of satisfaction to which the American claimants were entitled under the law of nations.

The American government claimed, as the just and proper rule of compensation for the injury acknowledged, the original value of the

slaves at the time of the illegal seizure, with interest, by way of damages, from the time of such seizure until the money should be paid by the British government.

In his note of 8th February, 1837, to Lord Palmerston, Mr. Stevenson said:

"Besides the value of the slaves at the port of destination, damages or interest, from the time of their seizure, will constitute a part of the compensation claimed, upon the principle that a just indemnity in such cases must include not only the return of the property lost, (if to be had,) or its value, (if not,) but compensation for the detention in the shape of damages or interest. That since, however, damages cannot be ascertained in cases like the present, interest will be received in lieu thereof, as a part of the indemity agreed to be made; and that it will therefore be expected that to the value of the slaves, at the port of destination, the interest will be added from the time of the seizure of the slaves, to that of payment, together with the actual expenses incurred and paid by the owners and their agents at Nassau, in consequence of the proceedings of her Majesty's colonial authorities."

[On the value of the slaves, at the port of destination, six per cent. interest was claimed, it will be observed, together with expenses, being two per cent. above the legal rate of interest in Great Britain.]

To the above note of Mr. Stevenson Lord Palmerston replied:

"Her Majesty's government connot acquiesce in the specific demand made by Mr. Stevenson for interest, at six per cent., and for payment of the expenses incurred by the owners or their agents in prosecuting their applications for the recovery of their slaves, &c." "Her Majesty's government, however, in arranging the amount of compensation, will be ready to take into their consideration the delay which has occurred in the settlement of these claims, and they will not object to allow the ordinary rate of interest from the 7th January, 1837, the date at which the claim for some compensation in respect to the 'Comet' and 'Encomium' was first admitted."

In acknowledging the foregoing note of Lord Palmerston, Mr. Stevenson, under date of 30th October, 1838, said:

"It is with not less surprise than regret that the undersigned now learns from Lord Palmerston's note the grounds upon which her Majesty's government seem disposed to adjust these claims. * * As he cannot acquiesce either in the correctness or justice of the principles assumed by the lords commissioners of her Majesty's treasury in relation to the number or value of the slaves liberated, or the period of time from which the interest ought to commence, * * he will deem it proper to avail himself of the earliest opportunity to reply to his lordship's note, and to place the grounds upon which the claims for indemnity rest fairly before her Majesty's government."

Under date of December 4, 1838, Mr. Stevenson presented those grounds to the British government in a letter to Lord Palmerston. The third point of that letter was: "The question of interest on the amount of compensation to be made."

On this point, the American minister, Mr. Stevenson, acting under full instructions from his government, makes the following observations and lays down the following propositions:

1. "That the claimants have the same right to interest on the value of these slaves that they have to the value of the slaves themselves, and that, too, from the period of their seizure and detention, is a proposition which the undersigned would not have deemed it either necessary or proper to discuss, if he did not understand the decision of her Majesty's government, communicated by Lord Palmerston's note, as asserting directly the contrary doctrine. Regarding such decision upon principle as of much higher importance than even the pecuniary interest which it involves, the undersigned feels it incumbent on him, in dissenting wholly from the grounds taken by her Majesty's government, to give the subject a more particular examination than he should otherwise have felt it needful to do."

[The next proposition relates to the right to interest, on pecuniary or mere money demands, between nations and under the law of nations.]

2. "That if a duty to be performed, however, be not the payment of money, but the performance of some collateral act, that is, the restitution of property, (other than money,) then, in lieu of interest, damages are awarded, and these damages, together with the property to be returned, are to constitute the indemnity of the sufferer for the loss he may have sustained by reason of the non-performance of this duty."

3. "That the measure of these damages will be the probable fruits or profits which might have been derived from the property or thing detained during the period that the duty of restoring it was not performed."

4. "That if restitution of the property cannot be made by reason of its loss, or from any other cause, then its value may be estimated in money, and this equivalent will stand in the place of the thing itself; and when reduced to a pecuniary standard, interest upon the equivalent is allowed in lieu of the fruits and profits, and flows as in other cases of money not paid, as the necessary consequence of the non-performance of the duty of restitution."

5 "That although, under the laws of Great Britain and the United States, it is admitted that in transactions between individuals, interest *eo nomine* would not be due on unliquidated demands of a nature purely and exclusively pecuniary, except from the period of their liquidation, yet it is equally true that by those laws, when reparation is sought for the loss of property, (in cases like the present,) the value of the property, together with an equivalent for the use of it, from the commencement of an illegal detention, *is always allowed.*"

6. "That these are principles sanctioned as well by the law of nations as those of the civil and common law, by the authority of precedents between Great Britain and the United States, a few leading references will satisfactorily show. To these the undersigned begs leave to refer Lord Palmerston."

Mr. Stevenson then cites Grotius, as cited by us in support of the Florida claims. Also 2d vol. Campbell's Grotius, p. 360—vol. 6, see 1224. Cites Domat to show that fruits and profits were allowed by the civil law, as cited by us and by Judge Bronson. Cites Pothier, Code Napolion, Blackstone, Vesey's R., 2 Brown's c. c., and says:

"It (interest) has, moreover, never been refused in claims like the present, where a money equivalent has been substituted as a compensation for property wrongfully withheld, and for which the party had agreed to make reparation."

Mr. Stevenson said, p. 52:

"Let us now see how far these principles have been enforced and illustrated by the authority of precedents, and more especially by British courts setting under the law of nations."

Mr. Stevenson then cites the allowance of interest under the 6th and 7th articles of Jay's treaty of 1794, cited by us. He also cites the opinion of Sir John Nicoll, one of the British commissioners under the 7th article of said treaty, as cited by us. Also, cites the decision of Sir Wm. Scott in the case of the Acteon, as cited by us, Judge Bronson and others, and says:

"The general doctrine, then, is this: that he who withholds what he ought to return, does an injury for which he is bound to indemnify the sufferer; that the proper measure of indemnification is the thing which is withheld, together with its reasonable fruits or profits, accruing during the period that it is so withheld; that if restitution of the property, however, cannot be had, justice finds its compensation or its value as an equivalent, and interest on it is resorted to as the best standard by which to ascertain the reasonable profits of money."

Mr. Stevenson cites Grotius and "Code de L'Humanete" for a d finition of indemnity, and to show that it embraces the whole wro n or injury.

Mr. Stevenson closes his note to Lord Palmerston by an enforcement of the right to the interest claimed, in the language of Langdon Cheves, and of the opinion of Attorney General Wirt, (as cited by Mr. Solicitor Clark, Judge Bronson, Mr. Webster, and others,) in the controversy with the British minister and government under the convention of 1818, and the award of the Emperor of Russia, where the same question arose, being one of the leading authorities cited in support of the Florida claims.

The doctrine thus laid down and enforced by Mr. Stevenson, on behalf of the American government, was fully admitted by Lord Palmerston, on behalf of the British government, in his reply to the foregoing note of Mr. Stevenson, dated May 2, 1839, in which he informed Mr. Stevenson that:

"With respect to the charge which the claimants in both these cases have made, on account of the expenses incurred by them in procuring evidence in support of their respective claims, it appears to her Majesty's government that a reasonable allowance ought to be made upon this head." [No such allowance was made in the Florida cases.] "Her Majesty's government is, moreover, of opinion that, considering all the circumstances which have delayed the admission and adjustment of these claims, interest, at the rate of four per cent. per annum, may with justice be *demanded* from the British government upon the sums assigned as compensation on account of the slave question, and that such interest ought to run from the dates when those slaves were seized by the officers of the customs at the Bahamas, up to the period when the compensation *shall be actually paid.*"

The claims of both vessels were, accordingly, adjusted and paid on these principles, viz: 1. Value of the slaves at the time of seizure. 2. Interest from the time of seizure until the time of payment, at the legal rate of 4 per cent. 3. Expenses incurred in procuring evidence, &c., as will be seen by reference to Mr. Stevenson's letter to Mr. Forsyth, Secretary of State, of the 8th May, 1839.

In Mr. Stevenson's letter to Mr. Forsyth, of the 6th August, 1839, he informs the Secretary of State that the appropriation for the payment of these claims, thus adjusted, relating to slaves, and amounting to the "sum of £23,500 sterling, was voted last night in the House of Commons, without a division, and after a little debate."

The Florida claims are identical, in principle, with the foregoing; and though the Attorney General admitted the justice of the measure of damages under the law of nations, as established and enforced in the foregoing cases, he declined to advise the Secretary to adopt and apply the foregoing principles to those claims, because he said he knew "of no actual precedents *between nation* and *nation* that *settle the question* one way or the other." This desideratum is certainly supplied by the foregoing cases.

So far as the precedents of the decisions of former Secretaries of the Treasury in these cases were relied upon, it has since been conclusively proved, by the testimony of all the said Secretaries, that no one of them applied the law of nations to those cases as treaty cases, which the Attorney General distinctly declared to be the only law applicable to them.

The foregoing decision in the cases of the "Encomium" and "Comet" is fully sustained by all the writers on the law of nations; by the decisions of all the courts in England and this country, (including the Supreme Court of the United States,) sitting under the law of nations; and by the uniform decisions of the government of the United States in its diplomatic intercourse and in the construction of its treaties with nations, as heretofore shown by the decision of Judge Bronson, and by the opinions of Mr. Webster, Mr. Ewing, Mr. Berrien, Mr. Forward, Mr. Solicitor Clark, and others; and by the opinions of Wm. Pinkney and Mr. Attorney General Wirt, under the treaty of 1794 and the convention of 1818 with Great Britain. It is, moreover, a principle of public law of the most vital importance to the United States as a commercial nation.

CHA. E. SHERMAN,
Counsel for Florida claimants under the 9th article of the treaty of 1819 *with Spain.*

WASHINGTON, *December* 9, 1852.

IN THE UNITED STATES COURT OF CLAIMS.

LETITIA HUMPHREYS, Administratrix of the estate of Andrew Atkinson, deceased, *vs.* THE UNITED STATES.	*Petitioner's Brief.* On Re-hearing.

I.

The 9th article of the treaty requires the injuries for which it stipulates satisfaction to be *judicially* established, and binds the United States to satisfy, by payment, such and such *only* as shall be so established.

The English version is as follows:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

The Spanish version, as follows:

"Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufrido por las operaciones del Exercito Americano en ellas."

The English side of the treaty requires the injuries to be established "by process of law," which are the precise technical words of the common law, to signify a judicial proceeding. These words were, undoubtedly, borrowed from the common law, to signify a judicial proceeding which was to take place under our own municipal laws, and before our own courts or judges, and must, by a well-established rule of construction, be referred to that code for their meaning.—(3 Wash. C. C. Rep. 209, Smith *vs.* Jones; 1 Wash. C. C. Rep., p. 56, Hurst *vs.* Hurst, and authorities generally.)

But all doubt on this point is now removed by the translation of the Spanish side of the treaty, recently obtained at the instance of his honor Judge Scarburgh. The equivalent words in the Spanish are, by that translation, "shall *judicially* prove according to law."

The translator on the part of the government says: "The translation might be varied, and the meaning still preserved; but to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by *judicial proceedings* of some kind."—(For translations, see Appendix, No. 1.)

In the case of the United States *vs.* Perchman, (7 Peters, 51,) in commenting on the English and Spanish parts of the 8th article of the same treaty, Chief Justice Marshall said:

"The treaty was drawn up in the Spanish as well as in the English languages. Both are *originals*, and were undoubtedly intended by the parties to be identical, * * If the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail."

Instead of violence, to produce conformity, it would seem to require

little short of violence to produce diversity of meaning between the English and Spanish parts of the 9th article, as to the *mode* in which the injuries are to be established.

It is thus placed beyond all possible doubt that the treaty required the injuries to be "established" by a "*judicial proceeding.*"

It is equally clear that the United States stands solemnly bound, by this treaty, to make satisfaction for such injuries as shall be so established.

The manner or *mode* in which the injuries were to be "established" is thus distinctly agreed in the treaty itself, and becomes an essential part of it, and necessarily excludes all other modes, either to bind the United States, or to fulfil its treaty obligation to the claimant or to Spain. This provision is peculiar, and is found in none of our other treaties; it is rendered more peculiar and striking when contrasted with that which immediately follows it in the 11th article of the same treaty, for ascertaining the claims of our own citizens upon Spain, for like injuries in violation of the law of nations, which are to be established by a board of commissioners in the usual manner.

This striking contrast, as to the *mode* of establishing similar claims, under the same treaty, clearly indicates a distinct object in the minds of the high contracting parties, and cannot be overlooked or disregarded.

The important fact, then, that the treaty expressly requires the injuries to be established *judicially*, must be *distinctly borne in mind* in the construction of the acts of Congress passed to carry it into effect; and every construction of those acts, founded upon the idea that the treaty did not require the claims to be judicially established, or that they could be established, as the treaty required, by an ordinary board of commissioners—like that called for by the 11th article—or by any executive officer, must be entirely abandoned. The entire certainty on this point, which results from the recent translation of the Spanish side of the treaty, presents the case in a light in which it has never been decided.

2. The Secretary of the Treasury could not act *judicially* under the acts passed to carry the 9th article of the said treaty into effect. He acted as an *executive* officer, under his appointment, commission, and oath as Secretary of the Treasury, and in that capacity in which he was authorized to pay money out of the Treasury. He had never been appointed, commissioned, or sworn in any other capacity, and if he did not act in that, he was not constitutionally authorized to act at all.—(Constitution of the United States, article 2, section 2.)

In the case of Martin *vs.* Hunter's Lessee, the Supreme Court of the United States said:

"The object of the Constitution was to establish three great departments of government—the legislative, the executive, and the judicial departments. The first to pass laws, the second to approve and execute them, and the third to expound and enforce them."—(1 Wheaton, 304.) This court laid down the same doctrine in the case of Magruder.

In the same case the Supreme Court further said:

"Congress cannot vest any portion of the judicial power of the

United States except in courts ordained and established by itself."—(Ib., Constitution of the U. S., art. 3.) That "nothing, therefore, is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state."—(See 1 Black. Com. 269.)

No one has ever expressed the opinion that the Secretary of the Treasury acted *judicially* under the acts passed to carry the 9th article of the Florida treaty into effect.

In the case of Beatty's Executor this court decided, that "no part of the *judicial power*, under the Constitution of the United States, can be conferred upon an executive officer." And in the case of Sturgess, Bennet & Co., where an act of Congress authorized the Secretary of the Treasury to refund money paid by importers "whenever it should be *shown to his satisfaction*" that it had been illegally exacted, this court decided "that the power which it (the act) confers upon the Secretary of the Treasury is *purely administrative*, and in no sense *judicial*." And this court further said in the same case, that "it would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." That "it (the law) did not vest the Secretary of the Treasury with the power to decide upon the *rights* of the claimant, except to the extent that he might be required to act upon them." And this court further said in that case, that it was "no answer to this view, that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance."

The power vested in the Secretary of the Treasury by the act of 3d March, 1839, with reference to which this decision was made, namely, to pay "whenever it should be shown *to his satisfaction*, &c.," was the same power conferred upon him by the act of 3d March, 1823, to carry into effect the 9th article of the Florida treaty.

The principle thus laid down by this court was fully confirmed on a re-argument of the case.

As the Secretary of the Treasury did not and could not act judicially under the acts passed to carry the treaty into effect, he could not establish the injuries *judicially* as the treaty required.

3. The acts of 1823 and 1834 were intended by Congress to carry the treaty into full and complete effect. This is understood to be fully conceded by this court on the 3d page of the opinion, where it says, that "the acts of 1823 and 1834 must be considered as if their provisions were contained in the same act. The object of both acts is the same, namely, to furnish an *appropriate remedy* by which the injuries mentioned in the last clause of the ninth article of the treaty aforesaid *might be established*, and *the satisfaction there alluded to be obtained*."

The act of 1823 is entitled "An act *to carry into effect* the ninth article of the treaty," &c.; and it provides for the establishment of the injuries by the judges "agreeably to the provisions of the ninth article of the *treaty* with Spain;" and for their payment by the Secretary of the Treasury when just and equitable "within the provisions

of the said *treaty.*" The *treaty*, therefore, is thus expressly made by Congress the absolute statutory rule both to the judge and Secretary. and must govern every body in the construction and execution of the acts of Congress. In other words, "the provisions of the treaty" are converted into *statute law* by Congress, and made the only guide of every body called to execute the acts. There is no law but the treaty, the treaty and acts being made one by Congress. We are not at liberty to construe the acts independently of the treaty. To attempt to do so will be a clear violation of the express provisions of the acts, Our first duty, therefore, like that of the judge and Secretary when acting under these laws, is to go to the treaty for the meaning and true construction of the acts. Whatever the treaty requires, the acts expressly require; whatever the treaty promises, the acts expressly direct; whatever the treaty requires to be done by the judges in the establishment of the claims, and by the Secretary in their payment, the acts expressly direct; whatever is inconsistent with the requirements of the treaty, the acts expressly forbid.

It was therefore the clear and undoubted purpose of the acts to carry the treaty into full and complete effect.

4. The power to adjust, adjudge, and adjudicate the claims, *i.e.*, to "establish" the injuries, "agreeably to the provisions of the treaty," is, by the acts, conferred, expressly and exclusively, on the *judge;* and no part of this power is conferred on the Secretary of the Treasury.

This power was conferred by the 1st section of the act of March 3, 1823, which was entitled "An act *to carry into effect* the ninth article of the treaty concluded between the United States and Spain, the twenty-second day of February, one thousand eight hundred and nineteen," and is in the following words:

"SEC. 1. That *the judges* of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed *to receive and adjust* all claims arising *within their respective jurisdictions*, of the inhabitants of said Territory, or their representatives, *agreeably to the provisions of the ninth article of the treaty with Spain*, by which the said Territory was ceded to the United States."

This is the only provision for the establishment of the claims enacted by Congress, when they first legislated to carry the treaty into effect; and it will be observed that the Secretary of the Treasury is not named in the section.

The 2d section of the explanatory act of the 26th June, 1834, which this court declares must be taken in connexion with the foregoing provision, declares, "That the *judge* of the superior court of St. Augustine be, and he hereby is, authorized to *receive*, *examine*, and *adjudge* all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813," &c.

And the act of the 3d March, 1849, for the relief of certain persons who had failed to file their claims in time, provides, "That the *judge* of the district court of the United States for the northern district of Florida be, and he is hereby, authorized and directed to receive and

adjudicate the claim of Peter Capella, administrator of Andrew Capella," &c.

In none of these acts is the Secretary of the Treasury named in connexion with the authority to adjust, adjudge, or adjudicate the said claims. That authority is conferred solely upon the *judges:* so that, whether the judges acted in their judicial capacity as *judges*, or as *commissioners*, the power and authority to establish the claims "agreeably to the provisions of the treaty" is conferred solely upon them.

5. The power and authority conferred upon the Secretary of the Treasury by the said acts is, expressly and exclusively, confined to the *payment* of the injuries which shall have been established *by the judge;* and whatever *discretion* is conferred upon him by the acts, is to be exercised *with express reference* to that *single question*, and not with any reference whatever to the establishment of the claims under the treaty. His authority is derived from the 2d section of the said act of March 3, 1823, which is in the following words:

"SEC. 2. That in all cases in which said judge shall decide *in favor of the claimants*, the decisions with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, *shall pay the amount thereof* to the person or persons in whose favor the same *is adjudged*, out of any money in the treasury not otherwise appropriated. Approved, March 3, 1823."

The 1st section of this act had expressly provided for the establishment of the claims "agreeably to the provisions of the treaty," by the judges, who could act judicially, as the treaty required; and this 2d section, it will be observed, simply provides for the payment, not of the Secretary's own decisions, but of the decisions made by the judge. Any discretion he is authorized to exercise, and any use he is to make of the evidence which is to be reported to him, has reference solely to the question of the *payment* of the decision of the judge. When he pays, he is to pay the decision of the judge; and the act expressly declares, without any exception, qualification, or discretion, that he "*shall* pay the amount thereof," *i. e.*, of the judge's decision. If he refuses to pay, it is a mere *negative act* of declining to pay, and certainly is not an *establishment* of the claim. A refusal to pay a decree of the judge cannot, with any propriety, be denominated an establishment of a claim.

Again: None but the decisions "*in favor* of the claimants" are to be reported to the Secretary of the Treasury. The adverse decisions of the judge are not to be even reported to him, nor is the evidence taken in support of claims rejected by the judge, to be reported to the Secretary. Nor can he increase the amount of a decree made by the judge in favor of a claimant, even where the evidence reported to him with such decree shows that the amount awarded is too small.—(See Secretary Woodbury's letter to Judge Reed, dated Oct. 7, 1838, Appendix No. 2.) The reason of this is, that the Secretary's power is confined exclusively to the payment of claims, (established by the judge,) in his executive capacity of Secretary of the Treasury, whilst both the treaty and the acts, passed to carry into effect, expressly require the

claims to be established judicially, in which capacity he could not, constitutionally, act, and was not authorized or required to act.

The unparalleled injustice and absurdity of so construing the plain provisions of the above recited act, as to make decisions of the judge *final* when *against* claimants, and of no validity when *in his favor;* and of making the United States take *two chances* for the rejection of claims to one in their favor, and that where a faithful fulfilment of a treaty stipulation was committed to their honor and good faith, will be more particularly noticed hereafter.

6. The acts passed to carry the treaty into effect require precisely what the treaty requires. (This is fully shown under head I, and 3d point of this brief, which see ante.)

There is no foundation whatever for the idea that the *acts* can be properly executed without a full execution of the *treaty;* and none for the idea that the acts call for anything different from the treaty.

7. To construe the *acts*, and to decide whether they have been properly executed, it becomes necessary, in the first instance, to construe the *treaty* and to ascertain what it calls for; because the acts expressly call for the full execution of the treaty, and we cannot know what that is, without first construing the treaty and deciding what it calls for. When we have thus ascertained what the treaty calls for, we have the *key* which Congress has expressly given to us for the construction of the acts passed *to carry it into effect.*

II.

Having ascertained from the clear and undoubted provisions of the treaty, and of the acts passed to carry the treaty into effect—

1. That the claims are required to be judicially established;
2. That the Secretary of the Treasury cannot so establish them;
3. That the acts were intended to carry the treaty into full and complete effect;
4. That the power to establish the claims as the treaty requires, is, by the acts, vested solely in the judges;
5. That all the power and discretion of the Secretary is expressly confined, by the acts, to the *payment* of the claims, and that he has no authority to establish them, because he could not act judicially;
6. That the acts require precisely what the treaty requires;
7. And that the *treaty* is the *key* to the proper construction of the *acts*, and that the acts require us first to construe the treaty in order to place a proper construction upon the acts passed to carry it into effect;

Let us see in what capacity the judges and the Secretary of the Treasury, respectively, acted; and the legal effect of their respective acts.

1. In deciding in what character the judges acted, it must be distinctly borne in mind, 1st, That the treaty required the claims to be

judicially established; 2d, That the acts required the judges to adjust and adjudge the claims "*agreeably to the provisions of the treaty;*" 3d, That the acts were intended by Congress to carry the treaty *into full effect.*

The "superior courts at St. Augustine and Pensacola" consisted each of a single judge. The judges had been appointed by the President and Senate, as the Constitution requires, and commissioned and sworn, and legal and territorial jurisdictions, respectively, assigned to them *as judges.* They had not been appointed, commissioned, or qualified to act, nor had any kind of jurisdiction been conferred upon them in any other capacity than as judges. As judges of the said superior courts they were each authorized to "exercise the same jurisdiction within its limits *in all cases arising under the laws and Constitution of the United States,*" which was vested in the court of the Kentucky district, by the judicial acts of September 24, 1789, and March 2, 1793.—(1 Stat. at Large, 73, 333.)

The court of the Kentucky district possessed all the powers and jurisdiction of a district and circuit court of the United States. It also had "exclusive *original* cognizance of *all seizures on land* * * under the laws of the United States;" * * * also "*of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty with the United States.*" "*Special* courts" were also to be held, "in the discretion of the judge."—(Sections 2, 3, 9, and 10 of Judicial act of September 24, 1789; 1 Stat. at Large, 73, 74, 77.)

By the acts of March 30, 1822, and of March 3, 1823, (the same day the first act to carry the Florida treaty into effect was passed,) the *same jurisdiction* was conferred upon the judges of the superior courts in Florida; and it was the precise jurisdiction which was necessary to execute the 9th article of the Florida treaty. *Torts only in violation of the law of nations and of a treaty of the United States,* (to wit, the treaty of 1795 with Spain, which had been violated by the invasion of Florida in 1812 and 1813,) were to be redressed; and the 9th article of the treaty of 1819 had stipulated that they should be "judicially" established. No other tribunal, accessible to the claimants, existed, in which the injuries could be judicially established as the treaty required.

By the act of 1823, the judges of these "superior courts, *established* at St. Augustine and Pensacola, respectively," were, "within their respective jurisdictions," authorized and directed to receive and adjust these claims; and the amount of their decisions was to be paid to the persons in whose favor the same was "adjudged."

The authority, it is said, was conferred upon the "*judges* respectively * * * within their respective jurisdictions," but not upon the court, *eo nomine,* and hence it has been inferred that the authority was not to be exercised judicially.

To this it is answered, that if the judges were not authorized to act judicially, they were not authorized to act at all, because they had never been appointed, commissioned, or sworn in any other capacity; and they could not act without constitutional appointment. They were to act "within their respective jurisdictions;" but they had no jurisdictions, except in their official capacity as judges of the superior

courts. Where courts consist of a *single judge*, they are indiscriminately denominated in the laws of the United States as "*the court*," or "*the judge of the court*;" both phrases meaning precisely the same thing. For example, jurisdiction was conferred upon the same judges of the superior courts of Florida to adjudicate the land claims, under the 8th article of the same treaty, with an appeal to the supreme court, where the duty to be performed was conceded to be judicial. The language was, that the said land claims "shall be received and adjudicated by the *judge of the superior court* of the district in which the land lies, upon the petition of the claimant," &c.—(Act of May 23, 1828, Stat. at Large, p. ——, sec. 6: 8 Peters, 466, United States *vs.* Clarke.) Another example may be seen in the Pension act of March 23, 1792, which requires the "circuit courts," (being composed of more than one judge,) and "the *judges* of the district courts," (being each composed of one judge,) to perform certain duties.—(1 Stat. at Large, 243, sections 2 and 3.) The 3d section of the Judiciary act of 1789 declares as follows: "And there shall be a court called a district court in each of the aforementioned districts, to consist of *one judge*, who shall reside in the district for which he is appointed, and *shall be called a district judge*," &c.—(1 Stat. at Large, 73.

Section 33 of the said Judiciary act of 1789 authorizes "any justice or *judge* of the United States to arrest, imprison, or bail, for offences against the United States."—(1 Stat. at Large, 91.)

Many other examples might be given where a judge, by the name and designation of judge, without denominating him the judge of any particular court, is authorized to perform acts clearly of a judicial character. A number of such examples will be hereafter cited where the Supreme Court of the United States has decided their acts to be judicial.

Again, by the said 1st section of the act of 1823, the judges are authorized and required to receive and "*adjust*" all claims "arising within their respective jurisdictions," &c.; and though the word "adjust" is used as synonymous with "adjudge" and "adjudicate" in the same and in subsequent acts, it has been supposed that the term indicates that the action of the judge is not intended by Congress to be judicial.

The following citation from the 2d volume of Woodeson's Lectures, p. 421, sec. 34, will show that a more appropriate term could not have been used to designate the judgment of a court sitting under the law of nations:

"The *law of nations* is adopted and appealed to by civilized States as the criterion for *adjusting* all controversies proper to be so decided. This is the rule by which the property of captures at sea is determined, more especially where the subjects of independent powers are interested in the *litigation*. In such cases, neither the customs of the British Admiralty, nor British acts of Parliament, can as such be of sufficient authority and avail. But the *law of nations* is a part of the laws of England."

For the high authority of this author upon questions arising under

the law of nations see the argument of Chief Justice Marshall in the case of Jonathan Robbins, 5 Wheaton, Appendix 1.

In explaining and defining terms used in the acts of Congress passed to carry the 9th article of the Florida treaty into effect, which have been supposed to militate against the judicial character of the action of the judge, it may not be inappropriate to remark, that the weight given to the word "award," used in the act of 1834 to designate the decision of the judge, as tending to show that the action of the judge was not judicial, is founded on an entire misconception of its legal meaning. That term is an appropriate one to describe the judgment or sentence of a court, as well as the decision of mere arbitrators or commissioners. It is the appropriate term to designate the sentence of a court of admiralty sitting under the law of nations in cases of illegal seizures or captures, to which the proceedings before the Florida judges bore the most direct analogy. All the English dictionaries give as one of its meanings that which I have stated. In Johnson's Dictionary it is defined as follows: "*Award*—Judgment, sentence, determination." "*To award*—To adjudge, to give anything by a *judicial sentence*."

Dr. Anthon, (the very highest authority,) in his "Latin-English and English-Latin Dictionary," defines this term as follows: "*Award, substantive—Judicium, arbitrium, decretum, sententia, litis adjudicatio.*" He defines *Judicium*, its first meaning, as follows: *Judicium, i. e. a legal trial, a judicial inquiry.*"

For the same purpose, notice has been taken of the fact that the judge in his report to the Treasury Department in this case, added to his proper signature the words "Judge and Com'r," (meaning judge and *commissioner*.) It would probably be bestowing all the consideration this fact deserves, to cite the maxim, "*Utile, per inutile, non vitiatur.*" A few words of explanation, however, will fully illustrate this unnecessary and unauthorized *addenda*. It was not added to the legitimate word "judge" until the act of 3d March, 1839, cut off certain extra allowance of pay which had been made to the judges for the extraordinary and unusual judicial service required in deciding these claims and the land claims, under the 8th and 9th articles of the Florida treaty. That act cut off all extra pay to officers, including judges as well as others, "whose salary or whose pay or emoluments is or are fixed by law." The salary of the "judge of the superior court established at St. Augustine," *as a judge*, was "fixed by law." If he had been a *commissioner* to decide claims under the 9th article of the Florida treaty—as no pay of any such officer had ever been "fixed by law," because no such officer had ever been appointed or contemplated—the act of 1839 would not have affected him. In this exigency, the judge contended, that because he decided the *facts* as well as the *law* in the cases arising under the 9th article of the treaty, he was not merely a judge whose sole duty it was, he contended, to decide questions of *law* alone; and that as he also decided the *facts* in these cases, he was a *commissioner* as well as a judge; and on this ground he demanded a continuance of his extra pay, which the Secretary had refused to continue, after the passage of the act of 1839, and this superfluous addenda was added to back up the claim.

In 1840 the question of law involved in this pretension, that the

judge acted as a commissioner *as well as a judge*—for it was never pretended he did not also act as a judge—was submitted by Secretary Woodbury to the Attorney General for his opinion thereon. That opinion was given on the 21st of October, 1840, and will be fonnd at pp. 1361, 1362, old opinions of the Attorneys General. The opinion was, that in performing his duties under the acts of 1823 and 1834, the judge acted under his judicial salary, (and of course in his judicial capacity, which was all that salary covered and compensated,) and that the act of 1839 deprived him of extra pay for that duty. This decision was fully approved by the Secretary, as it had been previously announced to Judge Reid by him.

This quibble of the Florida judge, for the purpose of increasing the salary affixed to his office by law, cannot affect the legal rights of the claimants under his adjudications.

Judge Bronson, of the district court of the United States for the northern district of Florida, in the case of Ferreira, went fully into the character in which the judges acted in adjudicating these claims; and he affixed his full official signature to his decrees and reports in these cases, as will be seen by his decision in that case.

In Pilkington's case, before the privy council, reported in 2 Knapp's Reps., p. 31, Sir James McIntosh said that in acting on cases arising under a treaty, that court was "*a court of the law of nations;*" and added, that "although unhappily for mankind, that law is destitute both of precision and power, and those who ought to be its subjects are powerful and rebellious, yet, as an important compensation for these great defects, it is at least free from all pettifogging and chicanery; every discussion on it must refer to the substantial justice and natural equity of the case."

Vattel admonishes those who deal with the treaty faith of nations against "quibbles on words," which he says "only serve to aggravate the crime of perfidy."—(B. 2, chap. 17, sec. 269, 273.)

Though the tready did not create a tribunal to establish the claims under the 9th article thereof, yet, as it stipulated for a *judicial establishment of the claims*, all other tribunals except a judicial one were as distinctly excluded as if they had been expressly excluded by the positive provisions of the treaty; and a *judicial tribunal* to establish them was as clearly provided for as if some particular judicial tribunal had been named in the treaty, as a board of commissioners was named in the 11th article. The United States, therefore, was not left free to establish any tribunal it pleased, or any tribunal but a judicial one. They might refuse to execute the treaty; or they might create a tribunal different from that promised; but a refusal to execute the treaty could not be set up as a fulfilment of it; nor could the action or decision of a tribunal different from that required by the treaty be claimed to be a fulfilment of the treaty stipulation; nor could the attribute of *finality* be ascribed to its decisions any more than it could to the decisions of an executive officer, if one had been substituted for the board of commissioners provided for by the 11th article of the treaty. The *treaty tribunal*, under the 11th article, was a board of commissioners; and the only tribunal that can be considered a *treaty tribunal* under the 9th article must be a *judicial* tribunal of some kind. None other

can fulfil the treaty stipulation for a judicial establishment of the claims. A tribunal totally different from that provided for by the treaty cannot, in any just sense, or with any semblance of good faith, be considered a treaty tribunal. A treaty tribunal must be one created in conformity to, and of the character provided for by the treaty, and not one created in violation of the treaty.

The 9th article of the Florida treaty stipulated for a judicial establishment of the claims in question, and bound the United States to pay what should be so established; and they cannot substitute the decisions of an executive for those of a judicial officer without a most palpable violation of the treaty.

The nature of the duty to be performed—that of establishing the amount and measure of damages to which the claimants are entitled for injuries to property, as in actions of trespass, or libels in admiralty for seizures of property in violation of the law of nations—is strictly judicial; and this is fully admitted by the Supreme Court.

When duties, *in their nature judicial*, are performed by persons holding a *judicial office*, the act is judicial. When duties, in their nature judicial, are performed by persons who do not hold a judicial office, as arbitrators or commissioners, the act is not judicial. This is the plain distinction between acts which are judicial, and those which are not. In other words, if the person performing the duty is not clothed with the *judicial office*, or if the duty to be performed is not of a *judicial nature*, in either case the act is not judicial.

The judicial character of the act does not depend upon its being performed *in open court*, and with all the formalities usually attending judicial proceedings, formally conducted in open court. The 9th article of the Florida treaty does not, necessarily, call for such a formal judicial proceeding. The nature of the duty to be performed being judicial, the treaty provided for a judicial establishment of the claims; and the acts of Congress, accordingly, provided for the performance of the duty by judicial officers (and the only judicial officers) possessing a plenary jurisdiction of the matters to be decided. The mode of proceeding was appropriate to the parties and to the nature of the duty to be performed, and is fully sustained by judicial precedents. The proceeding was authorized by the United States, in its own courts or before its own judges, and was, in its nature, like a proceeding upon a petition of right.—(Massachusetts *vs.* Rhode Island, 12 Peters, 750, 751.) It was for the United States to appear and contest, or not, as it saw fit. The form of proceeding was regulated, as far as it saw fit to regulate it; and so far as it was not regulated by statute, the judge was left to mould the proceeding, under the authority given to him to prescribe rules for its government, and by the common law.

"Whenever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law."—(Dwarris, 662, and authorities there cited.)

The original jurisdiction of the Supreme Court has never been regulated by law; but the court has been left to prescribe its own mode of proceeding.—(17 How. 492; see 1 Paine's C. C. R.; Appendix, p. 1.)

Numberless duties, prescribed by law to judges, will occur to the

mind of every lawyer and judge, where the mode of proceeding is not prescribed; but the acts, when performed, are judicial.

"The *Exchequer* holds sittings for equity business *out of term;* at which also a matter relating to the revenue may be discussed."—(1 Woodeson's Lectures, 120.)

The court of equity transacts much of its business out of term at chambers.

The court of admiralty is *always open* for the transaction of business, though it is *not a court of record*, (1 Woodeson's Lectures, 139;) and may *fine for contempt.* This the Florida judges could undoubtedly do; and it is an acknowledged test of judicial power.

The question as to the character in which judges or judicial magistrates act, in the performance of duties necessary to carry treaties into effect, is not a new one.

Under the 9th article of the consular convention between the United States and France, "the consuls and vice-consuls" of France were authorized to cause deserters to be arrested and delivered up. "For which purpose (it was provided) the said consuls and vice-consuls shall address themselves to the courts, *judges*, and officers competent, and shall demand the said deserters in writing, proving, by an exhibition of the register of the vessel or ship's roll, that those men were part of the said crew," &c.

A vice-consul made an application to a judge of the district court of the United States, who, for reasons alleged, refused to issue a warrant of arrest on the evidence produced. A motion was made by the Attorney General for a mandamus to compel the said district judge to issue his warrant; and the question was, in what capacity the district judge acted under this treaty provision. After a very elaborate argument of the Attorney General, in favor of the mandamus, the Supreme Court pronounced the following unanimous opinion, viz:

"By the Court: We are clearly and unanimously of opinion, that a mandamus ought not to issue. It is evident the district judge was acting *in a judicial capacity* when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Capt. Borre."—(3 Dall. 53.)

In this case the district judge was acting under the provision of the treaty, without any legislative act to authorize him to act. The duty performed by the judge was not peformed in open court, but in vacation, and at chambers; and was performed under a treaty, and without any act of Congress requiring the judge to act; and yet it was holden unanimously by the Supreme Court to be a *judicial act.*

Under the convention with France of the 9th November, 1843, for the mutual surrender of certain persons charged with crimes, which contained no provision for an application to the *courts, judges*, or magistrates, for the surrender of such criminals, and where the district judge had acted *without the authority of any act of Congress*, at the instance of the Executive, the convention having provided that "on the part of the government of the United States *the surrrender shall be made only by the authority of the Executive thereof;*" and "where the district judge, *at his chambers*, decided there was sufficient cause for the surrender of a person claimed by the French government;" the Supreme

Court decided, unanimously, that the Executive had properly referred the question of the surrender of the person claimed to the judge; and that "whether the crime charged is sufficiently proved, and comes within the treaty, are matters for *judicial decision;*" and the court say, the question was very properly "referred to the judgment of a *judicial officer.*"—(5 How. 188, 189.) The court further say, that "the mode adopted by the Executive in the present case seems to be the proper one. *Under the provisions of the Constitution, the treaty is the supreme law of the land, and, in regard to the rights and responsibilities* growing out of it, may become *a subject of judicial cognizance.*"

If the action of the district judge in this case was judicial, where the judge acted at chambers, and where there was no law requiring him to act, *à fortiori*, the action of the judges under the acts of 1823 and 1834 is judicial, where the acts of Congress require them to act in fulfilment of a treaty stipulation, and where the duty is strictly judicial.

The only question which has arisen in this class of cases arising under treaties has been, how far the judges were authorized to act under the provisions of the treaty as the supreme law of the land, or at the request of the Executive, without the authority of an act of Congress, and where the treaty contained no provision for the action of the judges. No doubt has ever been expressed, (except in the case of Ferreira, where the real question was merely whether an appeal lay in such cases to the Supreme Court,) that where a duty, judicial in its nature, in execution of a *treaty*, was devolved upon a court or judge, the action of such court or judge was judicial.

The act of the 12th of August, 1842, for carrying our extradition treaties into effect, authorizes "*any* of the justices of the Supreme Court, or judges of the several district courts of the United States, and the judges of the several State courts," "*severally,*" to act in extradition cases. Now, if the justices of the Supreme Court were to act in such cases is there any doubt that their action would be *judicial?* And if it would be, why should not that of the Florida judges be judicial?

The decision of the Supreme Court in the case of Ferreira, (13 How., 40,) was that an appeal did not lie in that case to the Supreme Court, and was strictly correct; but the reasoning of the court was founded on a series of errors in fact, which deprives that reasoning of all authority, and makes the case then decided *totally different* from that now presented for decision.

The reasoning of the court was based on Hayburn's case, (3 Dal., 410,) and on the *extra-judicial* opinions contained in the note to that case. The decision in that case assumed that the decision in Hayburn's case had settled a principle, but *no decision was ever made in that case.*—(See Appendix, No. 3.)

That decision also assumed that the pension act of 1792, and the act of 3d March, 1823, for executing the Florida treaty, were alike in principle, whereas they are totally different in principle. The power of revision by the Secretary, and by Congress, is expressly given

under the act of 1792, and only by construction and inference under the act of 1823.

The decision assumed that a majority of the judges were of opinion that under the act of 1792 they could act as commissioners, which was an entire mistake.

It also assumed that the question whether the judges could act as *commissioners* under that act had never been decided by the Supreme Court; whereas that court decided unanimously, in 1794, that the judges could not act as commissioners under that act.

The opinion also assumed that the executive and legislative departments of the government concurred in opinion that the court could not act *judicially* under that act; whereas the executive, legislative, and judicial branches of the government held that the judges could not act as commissioners, and that their action in that character was without authority and void.—(See Appendix, No. 3.)

It was assumed by the Supreme Court, and has been assumed by this court, upon its authority, that the act of 1792 only conferred authority to act upon the "circuit court," and not upon the judges, by the name of *judges*.

This is an entire *mistake of fact*. The third section of the act expressly conferred the same authority upon *the* JUDGE *of the district court*" in those districts where no circuit courts were directed to be holden.—(1 Stats. at L., 243, 244.)

And it has recently been discovered that, after the Supreme Court and Congress had decided the action of the judges as *commissioners* to be unauthorized and void, the decisions of the district judge of Maine, *acting judicially*, were recognized as valid, and paid as *legal adjudications*.—(See Appendix, No. 4.)

The whole foundation on which the opinion of the Supreme Court rested has been entirely removed by the establishment of a *different state of facts and law* from that assumed by the court. The authorities upon which it was decided are entirely different from what the court supposed. The note appended to the case "by the order of the court" retracts everything substantially, except the assumption that if the judges had been named *as judges*, as they were in the Florida acts to carry the ninth article of the treaty into effect, they could have acted as commissioners. It is now shown that they were also mistaken on that point—that the district judges were so named, and that they acted *judicially*, and that their action was recognized as judicial and valid.

Ram on legal judgment says that the authority of a precedent is destroyed when it can be said that "it is a decision in giving which the court was misled by a case of no weight, but on which it grounded its decision; * * * if that case *ought to have no weight*, then little attention is due to the decision founded on such authority." (P. 183, cites 2 Bingham, 292, 297, 303.)

Such is the decision in Hayburn's case, and the extra-judicial letters in the note thereof, on which the reasoning of Judge Taney was founded in dismissing Ferreira's case *for want of jurisdiction*. The jurisdiction of the Supreme Court in that case did not depend on the fact whether the judge acted as judge or commissioner; if the judge

had been conceded to have acted *judicially*, the Supreme Court would have possessed no appellate jurisdiction, because, 1, none was given by law, and it could only exercise such jurisdiction where it is affirmatively given by law; 2, because such jurisdiction was *necessarily excluded* by the direction to report the favorable decisions directly to the Secretary of the Treasury for payment.

To show that the reasoning of Judge Taney is founded in error and misapprehension, it should seem to be sufficient to state the fact that Judge Story, in his careful Commentaries on the Constitution, cites the same authorities cited by Judge Taney to show that the judges *could not act as commissioners*. He says:

"Sec. 1777, (2 vol., p. 256.) The functions of the judges of the courts of the United States are *strictly* and *exclusively judicial*. They cannot, therefore, be called upon to advise the President in any executive measures, or to give extra-judicial interpretations of law, or *to act as commissioners* in *cases of pensions* or other like proceedings." He cites, "5 Marshall's Life of Washington, ch. 6, pp. 433, 441; Seargt. on Const., ch. 29, p. 636. (2d ed. ch. 31, p. 375;) Marbury and Madison, 1 Cranch, 171; Dewhurst *vs.* Coulthart, 3 Dall. R. 409; *Hayburn's case*, 2 Dall. 409, 410, *and note*, ib., and p. 411; Seargt. on Const., ch. 33, p. 391, (ch. 34, p. 401, 2d edition," to show that the Florida judge did act judicially, and that his action in that capacity was fully recognized by the Secretary of the Treasury, Mr. Woodbury; and that the judge shaped his proceedings to conform to the wishes and advice of the said Secretary.—(See Appendix, Nos. 5 and No. 6.)

As to the supposed objection, that there was "no suit," there was a petition filed in every case in the nature of a petition in chancery. The act of 1849 expressly required the claimant to proceed by petition, and shows that such was the intention of Congress under the act of 1834. Congress struck out the section of the law requiring the district attorney to appear, but did not alter the character of the proceeding. The United States appeared by the district attorney whenever they pleased, as in Ferreira's case. They had notice of the proceedings, for they authorized the party to proceed against them by petition, and had the option to appear or not as they pleased, and they are barred by the proceeding, as are all the world having notice and a right to appear in proceedings in admiralty. Sovereign States are never made parties defendant, having notice, they appear or not, as they choose. *Ex parte* proceedings before courts and judges are as much judicial as proceedings *inter partes*. The judges represented the United States. They appointed and instructed the commissioners to take evidence, filed cross-interrogatories, and cross-examined the witnesses, as the record in all cases will prove.

Had not Congress intended the judges to act in the judicial capacity in which they had already been constitutionally appointed, they would undoubtedly have provided for their appointment and qualification, as they did in the act passed to execute the eleventh article of the same treaty.

Had they understood that the ninth article was to be executed like *the* eleventh article—by a board of commissioners—they would have

left the *selection* and nomination of the commissioners to the President, as the Constitution required. There is no instance where Congress has undertaken to name the commissioners under a treaty, or to appoint them by an act. Such a proceeding is unprecedented, and would be an illegal and unconstitutional absurdity.

The transfer of the duty of deciding these claims, from the territorial to the district judge of the United States in 1847, when Florida was admitted into the Union, was a clear legislative interpretation that the duty was *judicial*. The district judge was only capable of performing *judicial* duty, and of receiving *judicial* jurisdiction. If the act of 1823 could, constitutionally, appoint the *individual* who then held the office of judge, a commissioner, he must have performed the duty in his *individual capacity*. But the person who then held the office of judge, (Hon. Joseph L Smith,) had been dead many years when the act of 1834 was passed; and if the supposed appointment had been individual and personal, a new appointment became necessary on his death. And again, the removal of such individual from office could not have operated a transfer of the duty to his official successor, unless the duty to be performed appertained to the office. This is too plain for comment or illustration.

If the acts passed to carry the ninth article of the Florida treaty into effect are susceptible of two constructions, one of which will carry the treaty into effect, and the other *defeat* its execution, upon every rule of construction the former interpretation must be adopted.

For these reasons, it is confidently submitted that the Florida judge must be holden to have acted judicially, as the treaty required. He could not have acted in any other or different capacity, because he had never been constitutionally appointed in any other, except of a judge.

2. The Secretary of the Treasury acted in his executive capacity, as such Secretary. He had never been legally or constitutionally appointed in any other. His sole duty was to *pay* the claims "out of any money in the treasury not otherwise appropriated." Of course he acted in that capacity in which he was legally authorized to pay money out of the treasury. No such authority could be conferred upon a commissioner to adjudicate claims under a treaty.

3. The Secretary of the Treasury, therefore, was *no part of the treaty tribunal* to establish the claims under the treaty. The treaty required that they should be established judicially, and he did not and could not constitutionally act in that capacity. His authority to revise the decisions of the judge, as a part of the treaty tribunal, has been assumed without the slightest warrant of legal authority, and upon a series of the most palpable errors, both of law and fact, the inevitable consequences of which would be to render the acts utterly unconstitutional and void, and defeat the acknowledged object for which they were passed, to wit: the full and complete execution of the treaty. A construction which would produce such a result, when a different and not unreasonable construction would avoid that result, and give a legal effect to the act and to the conceded intention of the legislature, violates every known rule of interpretation.

Another consequence would be, that all the claims rejected by the judge would be revived against the United States, and it would be the

plain duty of this court to report a bill to Congress for the execution of the treaty.

That the obligations of treaties, whether executed or executory, are the supreme law of the land, and binding on all courts of the United States, see the case of the United States *vs.* The Schooner Peggy, 1 Cranch, 256.

For the rules of construction sanctioned by the Supreme Court of the United States, see the case of the United States *vs.* Freeman, 3 Howard, 556.

4. The rights of the claimants, under the treaty and law of nations, have never been decided by any Secretary of the Treasury. They all declare that their decisions were based upon the usage of the department, and not upon the treaty and law of nations. If their rights under the treaty yet remain undecided, are they never to be decided? And if they are, by whom? If the Secretary who was directed to pay the decrees of the judge, agreeably to "the provisions of the treaty," has failed to perform that duty, and to execute the law, does that annihilate the treaty obligation, he being no part of the tribunal stipulated by the treaty? The Supreme Court concedes that the claimants have a right to apply to Congess for a correction of his errors. Does this court mean to overrule the Supreme Court on that point? If not, and if the claimants nave a right to go to Congress for relief, is it not the plain and unquestionable duty of this court to decide the rights of the party under the treaty, and to report such bill (if any) as may be necessary to secure those rights and to carry the treaty into full and complete effect?

This court is authorized and required, by the act of its organization, to hear and decide all claims "arising under any law of the United States," or under "any *contract*, express or implied."

This claim arises under acts of Congress which require the Secretary of the Treasury to pay the satisfaction stipulated by the ninth article of the Florida treaty. If the Secretary has not paid everything which the treaty, according to its just obligations under the law of nations, requires, he has failed to execute the law; and the duty of this court is the same in this case as it is in any other where the Secretary has failed to execute the law; namely, to report a bill to Congress for the relief of the claimants.

All the *political* power (and all the *legislative* power) necessary to carry the treaty into full effect has been exercised, by providing by law for the *establishment* of the claims by the judge "agreeably to the provisions of the treaty," and their payment by the Secretary when just and equitable, "within the provisions of the treaty."

The only question that remains, is one of the execution of the acts of Congress. When they are executed, the treaty must necessarily be executed.

Most of the claimants are *citizens of the United States*, who have no right to go to Spain for her interposition; but who have a right, like the claimants to land under the eighth article of the same treaty, to go directly to any branch of the government of the United States for the execution of the treaty, or of the acts of Congress passed to carry it into effect, and who have no right to go to Spain for that purpose.

Again: this claim arises under a solemn international contract, which is also made by the Constitution the supreme law of the land, and if it has not been fulfilled according to its fair and just obligations under the law of nations, it is the clear and undoubted duty of this court to report a bill to Congress for its fulfilment.

CHA. E. SHERMAN,
Attorney for Claimant.

APPENDIX.

No. 1.

NOTE.—The following are the translations referred to in the opinion of SCARBURGH, J.:

1.—*Translation furnished by the Solicitor.*

Extract from the Treaty with Spain of 1819:

Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufrido por las operaciones del Exercito Americano en ellas.

[Translation]

And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may or shall judicially prove, according to law, that they have suffered (literally to have suffered) by the poerations of the American army in them (the Floridas).

NOTES.—The words *si los hubiese habido* are about as literally translated, I think, by "if any there should have been," as they could be, preserving their plain meaning at the same time.

I understand the word *Españoles* to apply as well to *habitantes* as to *oficiales*. It seems to have been so understood by the negotiators of the treaty, and the arrangement of the words favors that idea, I think. *Oficiales Españoles* means Spanish officers, not officers of Spain; and in this case there might be a difference as well as a distinction. If the word was España, instead of Españoles, then it would not refer to *habitantes* without changing the phraseology of the sentence.

The words *justifiquen legalmente* are accurately translated, in my opinion, by "may judicially prove, according to law." *Justificar-justum facere* is a verb that has a good many meanings. When it is used as a law term, as it is in this clause of the treaty, it signifies *that*, or something equivalent. The translation might be varied, and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente*. Escriche says, in his Spanish Law Dictionary, that the word *justificacion* means the proving of something by documents or witnesses; and justificar means, in Spanish law, to produce judicially written or oral proof of a thing.

2.—*Translation furnished by the Counsel for the Petitioner.*

Y los Estados Unidos satisfarán los perjuicion, si los hubiesa
And the United States will satisfy the injuries, if them there have
habido, que los habitantes y oficiales Españoles justifiquen*
been, which the inhabitants and officers of Spain may judicially prove
legalmente haber sufrido por las operaciones del Exercito
according to law to have suffered by the operations of the [2]army
Americano en ellas.
[1]American in them, (the Floridas.)

NOTE.—This translation is made word for word, as being more satisfactory.

No. 2.

TREASURY DEPARTMENT,
October 7, 1838.

SIR: I have received a letter from Col. Downing in which he expresses an apprehension that you might be misled by some remarks in my communication to you of the 24th of July last.

He seems to think that an inference may be drawn from that communication unfavorable to the claimants in respect to the amounts allowed in cases, and for damages coming clearly within the principles adopted by the department. As no such design was entertained by the department in writing that letter or any other, I proceed cheerfully to state the fact; nor do I hesitate to add that, though in some cases the amount of the awards may have been reduced here on particular items in consequence of the parties' own exhibit, not claiming so much as you allowed, or for some other special reason, yet, in general, I do not apprehend that your awards have been higher as to the items approved here than the evidence warranted. On the contrary, several instances have come under my notice, where, unless some local knowledge of men and things, not appearing on the record existed and modified the result, I thought I could have felt justified in granting a larger sum for particular injuries than was allowed in the award.

But you are best acquainted with the country where the claim originated, with the value of property there, and with the character of the respective witnesses; and my chief object in this communication is merely to prevent any conclusion which it is supposed may be liable to be drawn from my former letter, that an opinion is entertained by this department not favorable to the great care and diligence exercised by you in protecting the government from the payment of damages larger in any particular case, or under any particular head, than were actu-

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*Justifiquen is translated "may *judicially prove.*" It is the subjunctive present of the verb *justificar.* This verb is translated into Latin by the Spanish academy, "*in jure, judicio probare,*" and is explained, in Spanish, by the same Academy, as follows:

"Probar judicialmente alguna cosa."
To prove judicially any thing.

(*See* Dictionary of Spanish Academy, verb JUSTIFICAR.)

ally sustained by the claimants. When the awards have not been sanctioned, it has generally been for other causes, which from time to time have been fully explained either to you or the parties, or their counsel, and which have not been inconsistent with an anxiety here that the real sufferers in Florida from the acts of the American troops in 1812 and 1813 should receive all the indemnity which the existing acts of Congress, and the former settled construction of them, appear to justify.

Respectfully yours, &c.,

LEVI WOODBURY,
Secretary of the Treasury.

Hon. R. RAYMOND REID.

No. 3.

Mistakes of FACT *apparent on the face of the decision in Ferreira's case* 13 *How.* 40.

1. That the act under which the claim of Ferreira was *adjudicated,* required "no petition."

2. That the question as to the character in which "a judge acts in a case of this description * * arose in Hayburn's case."

3. That the act of 1792 imposed the duty on the court "*eo nomine,* and not personally on the judges."

4. That "the motion for a mandamus in Hayburn's case" was "made merely for the purpose of having it judicially determined in this (Supreme) Court whether the judges, under the law, were authorized to act in the character of *commissioners.*"

5. That the question as to the authority of the judges to act as commissioners under the act of 1792 "*was not decided in the Supreme Court.*"

6. That "it appears from the *note* to the case of Hayburn that a *majority of the judges* of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the *judges,* they would have held that it was given to them personally by that description, and would have performed the duty as *commissioners,* subject to the revision and control of the Secretary and Congress, as provided by the law."

7. That "the opinions of all the judges embrace *distinctly* and *positively* the provisions of the act of 1823, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such."

8. That "there is no record of the proceedings in the district court" in Ferreira's case.

In the Note.

9. In supposing that the saving, in the repealing act, of "all rights founded upon any *legal adjudication,*" referred to rights founded upon the decisions of the judges *as commissioners.*

Every one of the above points and statements is *a clear and demonstrable error of fact.*

The errors of *law*, consequent upon these errors of fact, apparent on the face of the opinion, are even more numerous. They are pointed out in the brief filed on the first hearing of this cause, pp. 22, 23, 24.

Hayburn's Case.

This was a motion for a *mandamus* to be directed to the *circuit court* for the district of Pennsylvania, commanding the said *court* to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner.

The Attorney General (Randolph) at first proceeded *ex officio*, and afterwards on behalf of Hayburn, and argued the case on "the merits," upon "the act of Congress, and the refusal of the judges to carry it into effect."

"THE COURT observed that they would hold the motion under advisement until the next term, but *no decision was ever pronounced;* the legislature, (Congress,) at an intermediate session, provided in another way for the relief of the pensioners." (2 Dal. 409.)

The reasons of the circuit and district judges for not proceeding *judicially* under the act are contained in certain *extra-judicial* communications addressed by them to President Washington, to be laid before Congress, which are contained in a note to Hayburn's case.

No *judicial decision* was had under the act of 1792, except that of the Supreme Court in the case of Yale Todd, in which it was unanimously decided that the judges could not act as *commissioners* under the said act. *No other point was decided in that case.*

The leading reason assigned by *all* the judges for not acting *judicially* under the act was, "because the business assigned to the court by the act was not of a *judicial nature.*" None of the judges, except those of the district of New York, expressed or intimated any opinion that the judges could act as *commissioners* under the act. None of them expresses the opinion that they could have so acted if they had been named in the act as *judges* and not as a *court.* The judges of the district of New York concluded to act, and did act, as *commissioners;* and Congress, by the repealing act of 28th February, 1793, directed a decision of the Supreme Court to be obtained to test their authority to act in that character. That decision was had in the case of Yale Todd, and the Supreme Court, composed in part of the judges who had acted as commissioners, decided *unanimously*, as above stated, that they had no authority so to act, and Congress immediately passed a law declaring their action in that capacity invalid.

The Executive had previously repudiated the action of the judges of the district of New York as commissioners, and had instructed the Attorney General to apply to the Supreme Court for a mandamus to the "*circuit court*" for the district of Pennsylvania, to compel that *court* to proceed *judicially*, as a *court*, (not as *commissioners*,) to execute the law. This was done in Hayburn's case, as above stated, So that it is a matter of *absolute certainty, proved by the Executive, legislative, and judicial records of the country*, that *every department of the*

government denied the construction placed upon the act of 1792 by the judges of the circuit court for the district of New York, as set forth in the note to Hayburn's case; and that Mr. Chief Justice Jay, and Mr. Justice Cushing, when sitting in the Supreme Court, united with the other judges of that court in overruling their own construction of the act.

The opinion of the Supreme Court in Ferreira's case relies upon the extra-judicial opinions or letters of the judges, addressed to President Washington, to be laid before Congress—which opinions were not given in any case brought judicially before the judges, and were given without argument or judicial deliberation—and which were, after full argument and judicial deliberation, unanimously overruled in the Supreme Court, by the same judges, in the case of Yale Todd.—(Am. State Papers, vol. 1, Miscellaneous, pp. 49, 50, 51, 52, 53, 78. Special Message of President to Congress, of Nov., 1792, Ho. Journal, vol. 1, pp. 614, 649, 659, 666. Annals of Congress, 2d Congress, from 1791 to 1793, pp. 556, 557, for Memorial of Hayburn to Congress. Same book, p. 803, for amendment requiring judicial decision by Supreme Court. Ibid, 3d Congress, Supreme Court, decision in Todd's case, reported to Congress by Secretary of War. For Pension act of March 27, 1792, see 2d vol. Laws U. S., 1 Stats. at Large, p. 243. For act repealing same, see Stats. at Large, vol. 1, p. 324. For joint resolution of Congress, of June 9, 1794, rejecting all pension claims allowed by judges, as commissioners, under the aforesaid act of 1792, see Stats. at Large, vol. 1, p. 401. Ram. on Legal Judgment, p. 183. 2 Bing., 292, 297, 303.)

The first opinion, delivered before the case of Yale Todd was brought to the attention of the Court, shows that the case of Ferreira was disposed of without full examination, upon the authority of the extra-judicial opinions of the judges set forth in the notes to Hayburn's case. That opinion declared that "the question as to the character in which a judge acts in a case of this description *is not a new one.* It arose as long ago as 1792, in Hayburn's case, reported in 2 Dallas, 409," (p. 4.) After setting forth these extra-judicial opinions, which had been overruled by the Supreme Court in Todd's case, the opinion adds: "After the decision thus made in 1792, and acquiesced in at the time by the other departments of the government, we think that the question must be regarded as *settled*, and not now *open to controversy* under the act of 1823."—(Printed opinion first delivered, on file in the office of the clerk of the Supreme Court.)

The note appended to the said decision "by order of the court," after the decision in the case of Yale Todd was brought to its notice, divests the said decision of all authority, and leaves the decision of the Supreme Court, in the case of Yale Todd—*that the judges could not act as commissioners, under the act of* 1792—in full and unimpaired force.

No. 4.

This is to certify that the following sums of money are respectively due to the persons hereinafter mentioned for arrearages of their pensions up to the fourth day of March, 1789, in pursuance of the adjudi-

cation of the judge of the district of Maine, by virtue of an act passed 23d March, 1792, entitled "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate claims to invalid pensions."

John Bean	$150 00
Dudley Bradstreet	370 00
Squire Bishop, jr	65 00
Seth Delano	68 50
Peter Hopkins, jr	250 00
Joseph Roberts	155 00
Ezekiel Spaulding	28 00
Anthony Starbard	15 00
Moses Cass	95 00
Levi Chadburn	120 00
	1,316 50

TIMOTHY PICKERING,
Secretary of War.

AUDITOR'S OFFICE, *March* 2, 1795.
Examined: EZ'L FREEMAN.

COMPTROLLER'S OFFICE, *March* 2, 1795.
Examined: P. H. KUHL.
DEPARTMENT OF WAR, *March* 2, 1795.

I certify the within and foregoing to be a true transcript of voucher No. 6,530, now on file in this office.

F. BIGGER, *Register.*

MAY 10, 1856.

The within sums were allowed by the Auditor and Comptroller of the Treasury Department, March 2, 1795, as appears by the statement on file.

F. B.

No. 5.

Claims under the ninth article.

DISTRICT OF EAST FLORIDA,
At Chambers, August 20, 1834.

Notice is hereby given, that the undersigned is prepared to receive such claims for losses occasioned by the troops of the United States in the year 1812 and 1813 as have not heretofore been presented to the judge of this district, or in which the evidence was withheld in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of 22d February, 1819, between the governments of the United States and Spain.

Each claim will be perferred in the form of a petition, in which the

petitioner will set forth *particularly* the *nature and amount* of the losses sustained, the time at which they occurred, and (as the case may be) that the claim has not been before presented to the judge of this district, or that the evidence in said claim was withheld in consequence of the decision of the Secretary of the Treasury.

The petitioner will moreover aver, that at the time of suffering the losses complained of he was a subject of Spain, and that previous to the happening of said losses the agent or troops of the United States had entered East Elorida.

The petition *signed by the petitioner* will be filed with the undersigned, who will then appoint a time for receiving proofs in support of the same.

All claims must be presented within one year from the 26th June last.

Applications will be made at the chambers of the judge between the hours of *ten* and *four* in the day.

ROBT. RAYMOND REID,
Judge of the supr. court dist. East Florida.

The act of 26th June, 1834, was appended.

No. 6.

TREASURY DEPARTMENT, *Sept.* 19, 1834.

SIR: I am in the receipt of your letter of the 3d instant, relative to the manner of carrying into effect the provisions of the act of Congress approved the 26th of June last, "for the relief of certain inhabitants of East Florida."

It is to be observed, in reply to the first inquiry made in your letter, that it is thought proper that the facts set forth in the claimants' petitions should be substantiated by their oaths respectively, and that the witnesses who may be adduced to corroborate any facts should be examined before you, in order that such questions may be propounded to them as you may conceive to be necessary to elucidate the claim; but in cases where manifest inconvenience would arise in requiring the attendance of a witness before you, direct and cross-interrogatories may be framed, and the testimony taken in that manner. As the act of Congress makes no appropriation to defray the expenses, alluded to in your letter, of clerk hire, office rent, and stationery, no allowance can be made by the department for either of those objects. Besides, as it will be the duty of claimants to prepare statements of their claims, and have the testimony committed to writing by their lawyer or agent, it is not considered that you will require the service of a clerk.

I am respectfully, &c.

LEVI WOODBURY,
Secretary of the Treasury.

ROBT. RAYMOND REID, *Judge, St. Augustine.*

COURT OF CLAIMS.

LETITIA HUMPHREYS, administratrix, *vs.* UNITED STATES.

Brief of S. S. Baxter on reargument.

The opinion of the court places this case on the ground of *res adjudicata.* To that I shall address my argument, and rely on the following points and authorities:

I. The 9th article of the treaty of 1819 with Spain (8 vol. S. L., page 260) contains the following stipulation: "The United States will cause satisfaction to be made for the injuries," &c. This treaty stipulation is, by force of art. 6, § 2 of the Constitution, the supreme law of the land. It is a contract that the United States will make satisfaction to the sufferers therein referred to for the injuries sustained by them. The contract enures to the benefit of each sufferer, and gives each one a claim on the government which may be asserted in any manner authorized by the law of the United States.

Authorities:

The convention of 1800 with France (S. L., page 178) provides that property captured and not yet definitively condemned shall be restored.

In United States *vs.* Schooner Peggy, 1 Cranch, 103, Judge Marshall, delivering the opinion of the court, says: "The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of the contract between nations is to be demanded from and, in general, superintended by the executive of each nation, and, therefore, whatever the decision of the court may be, the claim upon the nation, if unsatisfied, may still be asserted. But yet, when a treaty is the law of the land, and, as such, affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded as an act of Congress."

The 9th article of the treaty of 1794 with Great Britain (8th S. L., page 192) stipulates that British subjects who now hold lands shall continue to hold them, &c.

In Shanks *vs.* Dupont, 3 Peters, this treaty so protected the right of the alien that he might maintain suit without legislation. The treaty operated between the States and the inhabitants thereof.—(Pages 247–50.)

Orr *vs.* Hodgson, 4 Wheat., 453. Jackson *vs.* Clarke, 3 Wheat., 1. Hughes *vs.* Edwards, 9 Wheat., 489, 496.

Treaty with Great Britain of 1793, 8 S. L., 56, 4th and 5th articles, preserves the lien of a mortgagee on confiscated estate, and protects the remedy as much as the debt.

Higginson *vs.* Mein, 417–19, 4 Cranch.

Revives debts, preserves remedies, and prevents bar of act of limitations.

Brailsford *vs.* Georgia, 3 Dallas, 1. Hylton *vs.* Ware, 3 Dallas, *189. Hop*kish *vs.* Rell, 3 Cranch, 415.

Treaty ceding Louisiana stipulates that the inhabitants shall be protected in the free enjoyment of their property. The word *property* embraces those rights which lie in contract—those which are executory, as well as those which are executed.

Soulard *vs.* United States, 4 Pet., 511–12.

Indian treaties:

Dancing Rabbit treaty with Chocktaws, 7 S. L., 335, article 14, stipulates: Each head of a family desiring to remain and become a citizen, &c., shall be permitted to do so, and shall be entitled to a reservation of 640 acres of land, and if they reside on the land four years, &c., *a grant in fee simple shall issue.*

In Newman *vs.* Harris, 4 How. (Miss.) Rep., 522, held these words an equivalent to a grant in fee on condition of residence. Judge Sharkey, delivering the opinion of the Court, says: Assurance by legislative act or treaty is as valid as a common law assurance, and cites Simms' Lessee *vs.* Irvine, —, Dallas, —. The question is one of intention, &c.

By the 6th article of Chickasaw treaty, 7 S. L., 452, the words "a reservation of a section each shall be granted," gave title in fee.

Niles *vs.* Anderson, 5 How. (Miss.) Rep.; Ladiga *vs.* Rowland, 2 How., 582; United States *vs.* Brooks, 10 How., 460, held, in the treaty with the Cados, the Grappes "shall have their four leagues of land reserved for them, their heirs, and assigns forever," gave the Grappes a fee-simple title as fully as any patent from the government could make one.

As to Indian titles granted in similar language in various treaties, see Hittickheme *vs.* Watts, 5 Smedes & Marshall, 563; Euchela *vs.* Welsh, 3 Hank., —; Cornet *vs.* Winston, 2 Yerger, Heywood, J., says, page 146: From this view of the case, it appears that practice, theory, and principle all unite in deciding that a treaty may, if it think proper, make an Indian a citizen, and vest in him a part of the Indian territory, to be held in fee simple.

Blair & Johnson *vs.* Pathkiller, 2 Yer., 407. Jones *vs.* Evans, 5 Yer., 323. Chinnubber *vs.* Nicks, 3 Porter, 362. ——— *vs.* McElderry, 5 Porter, 161. Johnson & Thomas *vs.* McGeeher, 1 Ala., 186. Gaines *vs.* Nicholson, 9 How., 365.

Examine Foster *vs.* Elam. 2 Pet., 314; U. S. *vs.* Arredondo, 6 Pet., 738; U. S. *vs.* Percheman, 7 Pet. 88; Henderson *vs.* Poindexter, 11 Wheat.; [Comegys *vs.* Vasse, 1 Peters, 216–17.]

II. By the 6th article of the treaty of 1819 the inhabitants of Florida who choose to remain were to be incorporated into the Union as soon as the Constitution would, &c. They therefore ceased, on the ratification of the treaty, to be subjects of the King of Spain; lost all right to his protection; became American subjects to be dealt with in good faith as such, and the King of Spain has no right to interfere in transactions between them and the United States.

Insurance Co. *vs.* Canter, 1 P., 542; Shanks *vs.* Dupont; Calvin's case, 7 Coke 7*b*: "Ligeance of the subject is of as great an extent and latitude as the royal power and protection of the King, *et e converso.*"

III. The contract made by the 9th article was executory, and no court then in existence had jurisdiction to pass upon it between the

government and the claimants. Therefore the duty of providing a tribunal which could pass on it devolved on Congress. This duty, as to those claimants who became citizens, was a legislative duty, intra-territorial in its character, with the discharge of which Spain had no concern; but it was to be performed by Congress as due to its own citizens, under the sanction of the contract made by the treaty, the Constitution, and obligations of justice.

IV. The acts of 1823, 1834, &c., were passed by Congress to perform this duty. Special and exclusive jurisdiction over the injuries for which satisfaction was promised by this treaty was conferred on the tribunal designated by these acts; and as to each case and each question over which it rightfully assumed jurisdiction under these acts, its decision was final and conclusive as to all judicial tribunals then existing; and no writ of error lay to the Supreme Court, or to any other court, and the power to relieve existed in Congress alone; and this is so, whether the tribunal was composed of the Florida judge alone, or was composed of the judge and Secretary of the Treasury; whether the Secretary had power to revise the decision of the judge, or only a power to decide whether the claim was within the jurisdiction conferred by Congress, and whether the tribunal was judicial or quasi-judicial, or was a mere commission; and whether the decision was on the merits or on the question of jurisdiction. And if the tribunal, or the Secretary in his final and revisory power, (assuming that to exist,) decided that the claim or any portion thereof demanded as part of the satisfaction promised by the treaty, was not within the jurisdiction conferred by Congress on the tribunal, then such decision is final on the question of jurisdiction conferred by Congress on the tribunal, but is not a decision on the right claimed under the treaty, and will not stop or bar the claim under the treaty before any other tribunal subsequently created and having jurisdiction of the question or claim. And to make a decision a bar, it must clearly and unequivocally appear the decision was directly on the merits and validity of the claim preferred under the treaty.

Greenleaf on Evidence, vol. 1, § 22, § 528–9–30. Cowen & Hills, Philips on Evidence, vol. —, page, 380–1, (Awards;) page 380. (Com. under act Par.,) 400; vol. 3, page 824, note 586; page 826, note 587; page 834, note 589; pages 951, 2, 3, 4, 5, 8, 9, note 692. On jurisdiction, 987, 694, 990. No jurisdiction no bar, 1004, (Awards,) note 695, page 1027; note 698, page 381; note 774, page 1135

Com. *vs.* Roby, 12 Pick., 502, Shaw, C. J., says: "Thus, where the court before which the former trial took place had no jurisdiction of the offence, the party cannot be deemed in law to have been put in jeopardy, because no valid binding judgment could have been rendered by such court."

Blin *vs.* Cambell, 14 John, 432.

Duchess of Kingston, case 20, State Trials, Law Library, vol. 44, page 422, and Mr. Smith's note.

Co. Litt, 352 *b*, where it is said: "Secondly, That every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference. Thirdly, Every estoppel ought to be a precise affirmation of that which maketh

the estoppel, and not be spoken impersonally. Eighthly, where the veritie is apparent in the record, then the adverse party shall not be estopped; for he cannot be estopped to allege the truth when the truth appeareth of record."

Hopkins *vs.* Lee, 6 Wheat., 113–4, Mr. Justice Livingston, delivering the opinion of the court, says: "It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties in the same or any other court. Hence, a verdict and judgment of a court of record, or a decision of a court of chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to each suit. In this there is and ought to be no difference between a verdict and judgment in a court of common law and decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it will be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of the courts of admiralty, to ecclesiastical tribunals, and, in short, to every court which has proper cognizance of the subject-matter, *so far as they profess to decide the particular matter in dispute.* Under this rule, the decree in this case was proper evidence, *if it decided or professed to decide the same question* which was made on the trial at law, *for the points which came only collaterally under consideration, or were only incidentally under cognizance, or could only be inferred by arguing from the decree, it is admitted the rule does not apply.*"

New England Bank *vs.* Lewis, 8 Pick., 117–8, Wilde, J., delivering the opinion of the court, says: "We are, therefore, to consider whether the facts charged in the bill are sufficient to avoid the bar, and we think they are." The rule is laid down in Ferrer's case, 6 Coke, 7, "when one is barred in any action, &c., by judgment, &c., he is barred as to that, on the like action, of the like nature for the same thing forever." When, however, the real merits of the action have not been inquired into in a former suit, issue may be taken on the fact, the judgment being pleaded in bar, (Hitchen *vs.* Campbell, 2 Wm. Black., 827;) and when issue is thus taken on the fact, evidence is admissible to prove what passed on the former trial, (Seddon *vs.* Tutop, 6 T. R., 607;) and of course when the fact is admitted, by demurrer or otherwise, the bar must fail. It is clear, therefore, we think, that as the merits of the present suit were necessarily excluded in the former action, because no cause of action had then accrued, the judgment in that action is no bar either at law or in equity.

Ravel *vs.* Farmer, 4 T. R., 146; Seddon *vs.* Tutop, 6 T. R., 607; Snider *vs.* Croy, 2 Johns, 226–9; Pleasants *vs.* Clements, 2 Leigh, 483.

V. The Secretary of the Treasury has never decided the claim and

question of right presented in this suit. The claim is for interest on the actual amount of losses sustained in 1812–'13, as part of the satisfaction promised by the treaty, and the question of right is, whether, by the true construction of the treaty, they are not so entitled. This claim and question the Secretary has never decided; but, on the contrary, has decided that, under the construction of acts of 1823 and 1834, no jurisdiction or authority was given to the judges or Secretary to consider and decide this question.

And on this point, the decisions of the Secretaries, the opinions of the Attorneys General, which were the basis of the decisions, and the letters of the officers acting on these cases, are relied on.

The decision in this case is one of a series of decisions, and is to be received and construed according to this series.

The first in the series was made by Mr. Woodbury, in the case of John Gianopoli.—(See judicial records of the department, folio 145; letter of Wm. L. Hodge to Hon. Wm. A. Graham, June 9, 1851; Ex. Doc. 58, 2d session 25th Congress, H. R.; Ex. Doc. 98, 3d session 25th Congress, H. R.)

He allows the claim, "*with exception of interest, which it is not believed has been allowed in claims similarly situated.*"

This, to be a bar on the merits, must be express and direct to the merits, and the bar is not to be inferred by arguing from decree. When we examine it, it is clearly a decision on the question of jurisdiction alone.

1st. It does not purport, directly or indirectly, to decide whether under the treaty interest is due.

2d. The Secretary does not profess to derive his authority to act from the treaty, but derives it solely from the act of Congress.

3d. The reason assigned for the decision is, that it is not usual to allow interest on claims similarly situated. Now, it is the alleged usage of the department not to allow interest on claims settled under authority of acts of Congress, unless the act expressly or impliedly allows it. Hence the usage renders it necessary to construe the act of Congress to ascertain whether the terms of the act require the payment of the interest. And the decision of the Secretary is, that this act, construed in the light of this usage, gave no authority or jurisdiction to allow interest. Of consequence, it gave no authority to inquire whether it was due. The decision is therefore necessarily on the question of authority or jurisdiction conferred by acts of Congress, and that alone. And this view is fully sustained by the action of the department in all the subsequent cases.

See Mr. Crittenden's 1st opinion, Opinions Att'ys General, 1831, vol. 3, page 635.

Opinion of Mr. Nelson, vol. 4, page 363. Mr. Crittenden's 2d opinion, April 1851, vol. 5, pages 333–'4. Document containing letters of Mr. Young, Mr. Harrington, Mr. Corwin, Mr. J. C. Spencer, and Mr. Bibb.

Mr. Cushing's opinion and Mr. Guthrie's report, Doc. No. 82, 33d Cong. 1st session, Senate. Page 9, Mr. Cushing states, as the result of the previous opinions: "That Congress has reserved to itself the

power to decide whether interest shall be allowed in such cases, and without the authority of Congress, it cannot be paid."

The conclusion on the review of all these decisions is, that as to the amount of actual losses, the cases are *res adjudicata;* but as to the claim of interest, and whether it is due by the treaty, it has been finally and conclusively decided that the acts of 1823 and 1834, &c., gave no authority or jurisdiction, either to the Secretary or to the judges, to consider it and decide. Of course the Secretary has never considered or decided the question, and it is not *res adjudicata.*

VI. This court has jurisdiction of the merits of the case. It has jurisdiction to hear and determine all claims founded on any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein.

This is a general jurisdiction over all claims of this class, &c.

This jurisdiction is not excluded by the special jurisdiction created by the acts of 1823 and 1834.

That jurisdiction is thus described in Ferreira's case, 13 How., page 47: The authority of a commissioner to adjust certain claims against the United States, 47–8, is substantially the same with those usually created where one nation agrees by treaty to pay debts on damages which may be found due to citizens of another country, 48. Nothing more than the power ordinarily given by law to a commissioner, to adjust claims to land or money under a treaty, or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned.

In this case the Supreme Court is discussing the question of jurisdiction, and the remarks are sufficient to show that they considered this a tribunal of exclusive and final jurisdiction, from which no appeal lay. But the remarks cannot be construed to show this was a peculiar tribunal, having a jurisdiction which would exclude the jurisdiction of any Court afterwards created by Congress. In page —, they say the decision cannot be disturbed without the authority of an act of Congress. Tribunals usually created when one nation is to pay debts on damages, &c., are of two descriptions:

1st. Where the debts, &c., claimed are referred to a board of arbitrators; there the award is final, because there is no appeal except to war.

2d. Where one nation pays a stipulated sum *en masse* for the debts or damages due from it to the citizens of another nation.

In this case the nation receives the payment in trust for the injured citizen. The legislative power provides by law for the payment of this sum, through commissioners, and prescribes terms, mode of proof, &c. The law providing for the distribution must govern the distribution, and all claimants must conform to that law.—(Baron de Bode's case, 16 Law and Equity Reports, page 25.)

But this case differs from both these in two respects:

1st. The injury to be redressed was done by our government to Spanish subjects at the time of the injury, but who became American subjects by the treaty promising redress.

2d. The government promises a direct satisfaction to these persons individually, and to the extent of the injury sustained by each, and by direct proceedings instituted by each.

Then, on the reasoning of Ferreira's case, the tribunal created for the execution of this treaty must be considered as commissioners to adjust certain claims against the United States, or as having special power to inquire into a particular class of controversies in which the public is concerned.

The decision of this tribunal, that the law creating it did not confer on it jurisdiction of this claim, not being subject to appeal, is final and conclusive; and settles that the claim in question was not embraced in the authority conferred on the tribunal, but leaves open the question whether the demand is due under the treaty to such tribunal as Congress, by grant of either general or special jurisdiction, may empower to decide it.

Assuming this to be the settled construction of the acts of 1823 and 1834, those acts do not provide for this claim, and it being embraced in the general jurisdiction of this court.

S. S. BAXTER.

IN THE COURT OF CLAIMS.—No. 44.

ON THE PETITION OF LETITIA HUMPHREYS.

Brief of the United States Solicitor.

This is one of a numerous and important class of claims known as the Florida claims, on which the sum of $1,200,000 has already been paid, and the sum of $1,700,000, or thereabouts, is still demanded from the United States for interest.

They have been before Congress, in one form or another, for upwards of thirty years, and were again and again rejected when they were urgently pressed by the claimants and their agents, although they were then represented not to exceed in amount the sum of $40,000. But finally, on that representation, and after many years of importunity, a bill was reported and passed *for their relief*. From this small beginning, and by these insidious means, a claim, which at first all departments of the government, composed of those who were contemporaries of the transaction and fully conversant with the facts, concurred in rejecting when it was only $40,000, has already despoiled the treasury of more than a million, and now demands almost two millions more! The remarks of Mr. Butler, made in the Senate on the 2d of March last, to be found on page 1111 of the Congressional Globe, contain a concise and clear statement of the history of these claims, and a complete exposition and refutation of the legal grounds on which they are now presented. I shall read these remarks to the court as a statement of the case and part of my argument. They are as follows:

"In 1811, and 1812, and 1813, before and during the war between the United States and Great Britain, an insurrection occurred in East Florida, and the parties attempted to establish a government independent of the Spanish authorities. A large number of armed men joined the so-called patriots, some from the State of Georgia, and some from other parts, but they mostly went into Florida through St. Mary's, Georgia. They did not succeed in establishing their new government, for the Spaniards called in the Seminoles to aid in repelling them. The Indians, it seems, when the war was raging, did not discriminate much between their Spanish allies, or the revolutionists, and volunteers from Georgia. The first disturbance, or the 'patriot war' of 1811–'12, was succceeded by an invasion of East Florida by an armed militia force, under the command of Colonel Newnan, of Georgia, and Colonel Williams, of Tennessee. It has been said that these proceedings, in both instances, had the countenance of the federal government, and were under the secret acts and resolution of Congress, of 1811. But this was expressly denied by Mr. Madison, then President, and Mr. Monroe, Secretary of State. Regular troops of the United States were on the borders of Florida, and interfered to preserve our rights. The patriots were defeated, and those that remained in Florida were pardoned by the King of Spain. The claims now

urged are by the residents of East Florida, in 1811,–'12,–'13, and are not only preferred by those who were loyal Spanish subjects, but even by some of the patriot insurrectionists, for spoliations by the Seminoles, and the patriots and Georgia volunteers. They are for houses burned; crops of corn and cotton destroyed; horses, hogs, and cattle taken, and slaves killed or stolen; and all kinds of injuries.

"The second invasion was in 1814. General Jackson, whilst in the service of the United States, finding the Spaniards of West Florida, then a Spanish province, were incapable of fulfilling the duties and obligations of neutrality, and that they harbored and permitted British incendiaries, and white and black renegades from the United States, to take advantage of that weakness, and instigate the savages on the frontiers to war—and they did commit the massacre at Fort Mimms under such instigation—with the United States troops under his command, and militia regularly called into service, chastised the Indians in several battles, and finally drove them into West Florida, pursued them, and took possession of Pensacola, and followed the Indians in hot pursuit across several rivers, till they fled into East Florida. He acted under the authority of the United States, and under the law of nations. This was during the war with the British, and nobody ever disputed his right to pursue the Indians as he did.

"In 1817–'18, when we had no war on hand, except that with the southern Indians, whilst in the service of the United States, with the regular troops and militia under his command, after the massacres on the frontiers, General Jackson attacked the hostile Creeks and Seminoles on this side the boundary, whipped them in several battles, and followed them in hot pursuit into West Florida; again took possession of Pensacola, the Barancas, and St. Mark's, and drove the Indians a second time beyond the Suwanee. He executed two British subjects (Arbuthnot and Ambrister) and several Indians at St. Mark's, in April, 1818, and John Quincy Adams sustained him. He defended him on the ground that the Spanish authorities in Florida, and British incendiaries there, aided, abetted, instigated, and harbored the savages; and that the laws of nations justified him.

"We acquired the two Floridas by treaty, in 1819, after these three different invasions, or, if you choose, *aggressions* upon the Spanish territory. The treaty of 1819, ratified in 1821, is express, that as to all the *recent* or the late operations of the American army in Florida, the United States expressly stipulated that they would cause satisfaction to be made for the injuries, if any, which, by process of law, should be established to have been suffered by the Spanish officers and individual Spanish inhabitants. Mr. Crawford was then Secretary of the Treasury. These were the depredations of 1814,–'18, upon what was called West Florida. Those which had been committed, as was alleged, in 1811, and 1812. and 1813, were in what is called *East* Florida. The last were those alluded to in the treaty as 'recent' or 'late operations' of the American army.

"Mr. MALLORY. Will my honorable friend allow me to correct him? He will recollect that in the Spanish version of the treaty the word 'recent,' or the word 'late,' does not occur.

"Mr. BUTLER. Colonel White, former delegate from Florida, started that idea. In the renunciation of the claims to indemnity, the words 'recent events,' or 'transactions,' are in both versions; and the treaty refers only to the federal army and commanders. The fact is, that from the beginning to the end, there was an effort to bring these East Florida claims of 1811, 1812, and 1813, within the purview of the treaty. They never were within it, and nobody formerly thought them within it, except those who were interested in the claims. Two clauses of the ninth article of the treaty of 1819 provided that the United States should indemnify those persons who had suffered wrong or injury by the late or recent operations, events, or transactions of the American army, or commanders and officers of the United States—federal troops in the Floridas, and nothing else. These claims, in 1823, were by law referred to the judges of Florida, as commissioners, simply to ascertain what were those injuries, and to report them to the Secretary of the Treasury, with an express stipulation that his judgment should be the controlling and the final judgment upon the subject.

"I am not mistaken on that point, because Chief Justice Taney—and I have his opinion before me—or rather the Supreme Court of the United States has so decided after argument by counsel, on a case brought into that court in an effort to get a judicial decree or a judicial sanction in some form for those interest claims, which was denied by the court. When the commissioners first sat, in 1823 and 1824, the judges of the different districts in Florida, each being a commissioner for his district, some few of the claimants for the alleged spoliations of 1811, 1812, 1813, and of 1814, presented their claims to the judges. One of the judges (Breckenridge, I think,) would not decide that any but the claims of 1818 were within the treaty, but left that question to the decision of the Treasury Department, taking the testimony, and making a 'provisional' award, in case the department should decide the claims anterior to 1818 were included. The East Florida judge, a Mr. Smith, held that the claims of 1811, 1812, and 1813, presented to him, were within the treaty, and sent to the department some cases for allowance. Mr. Crawford was then Secretary of the Treasury, and he was also a member of the cabinet when the treaty with Spain was concluded in 1819.

"On the claims for spoliations prior to 1818 being presented to his view, he said they are not embraced by the treaty, and so endorsed on the papers of each claim. There might have been some reason for considering the claims founded on General Jackson's invasion of West Florida, in 1814, with an army of the United States under his command, and as a federal commander in hot pursuit of the hostile savages, and to dislodge and disperse the British incendiaries harbored by the Spanish authorities at Pensacola and St. Marks, who were instigating the Indians to murder our southern frontier population, as being within the treaty; but he decided that the treaty never intended to reach back even to those cases. As to the East Florida claims, arising out of what was called the *patriot war* of 1811, 1812, and 1813, he refused to allow any of them on the express ground that the treaty was not intended to include, and did not embrace them;

and he refused to pay the claimants a single cent. But they were not satisfied. They brought their claims before Mr. Richard Rush, who succeeded Mr. Crawford as Secretary of the Treasury. Mr. Rush gave them the same answer as his predecessor. He told them: Gentlemen, the treaty does not go back to and include the injuries and wrongs you allege were incurred at a period prior to or during the war between the United States and Great Britain.

"Some of the East Florida claimants of 1826 then petitioned Congress, and contended their claims were within the treaty. John Quincy Adams, who negotiated the treaty, and who, it is presumed, knew what claims were intended to be included, was a member of Mr. Monroe's cabinet when Mr. Crawford decided these claims were not embraced, and was President when Mr. Rush decided the same way, they were the arbiters, according to the terms of the law of 1823. Congress, or, more properly speaking, the House of Representatives, again and again decided these claims were not embraced within the treaty, by approving of reports of its committees at different sessions rejecting the claims on that express ground. I have not the documents at hand, nor time to go over them if I had, but I distinctly recollect that Mr. Forsyth, in 1826,* Mr. C. A. Wickliffe, in 1827,† and Mr. Archer, in 1830,‡ 1832,‖ and 1834,§ all made reports maintaining the doctrine that those claims were not strictly embraced by the treaty, and confirming the decision of Secretaries Crawford and Rush.

"But these claimants pertinaciously persevered. They would not be denied. They would not be content with the repeated decisions of the Executive and of the legislature. They could not be choked off. After some eleven years' importunity, at last, in 1834, they procured an act to be passed. Now, sir, what was then represented to Congress? Congress was told that the whole amount of claims did not amount to more than $41,000. The amount of the East Florida claims for all the invasions which had, prior to 1834, been presented, it is true, according to the papers sent by the judge to the Treasury, amounted to about that sum. Nobody had any idea that the claims would be swelled up to millions. Congress was deceived. It did not pass the act of 1834 because it supposed these claims were embraced by the treaty. The reports of the committee that reported the bill show this. The prior reports and the action of Congress upon them show it. The act of 1834 does not decide that these claims were in the treaty. It only refers to the act of 1823 as furnishing the *modus operandi* as to proofs and the rule of decision, and it provides expressly that none but Spanish subjects should be allowed, and no losses except those of the two years, 1812 and 1813, or for depredations prior to the entrance into East Florida of the federal agent or federal troops. The decisions of Secretaries Crawford and Rush are referred to, and the cases allowed to be examined by the judge of East Florida, notwithstanding such

* See Report House of Representatives, 1st Sess. 19th Cong., No. 12.
† See Report House of Representatives, 1st Sess. 20th Cong., No. 16.
‡ See Report House of Representatives, 1st Sess. 21st Cong., No. 176.
‖ See Report House of Representatives, 1st Sess. 22d Cong., No. 223
§ See Report House of Representatives, 1st Sess. 23d Cong., No. 308.

decisions; but it is a mistake to say the act of 1834 overruled their decision. The reports of the committee show this.

"The three first are express and unequivocal that the treaty has nothing to do with the claims. Mr. Everett's report of 1829 suggests that they may be brought within the treaty by extending its terms pretty liberally. He thought, as we had acquired Florida, and Spain was no longer an adversary, and as the people had become our own citizens, and members of our own family, we might afford to treat them kindly and generously, and pay them the $41,000; and as that was the only claim they preferred, even this was refused by Congress. Mr. Archer's reports contain the same suggestions, but take even a more liberal view than Mr. Everett's; for while they deny the obligation for indemnity under the treaty, they propose to allow them without reference to the treaty. Mr. Archer expressly said that he concurred in the Treasury decisions. So all the reports made by him contend. Mr. White, the Florida delegate, insisted, with great vehemence and earnestness, that the claims were within the treaty, his chief ground being alleged error in translation; but he was overruled.

"I do not care who are concerned in it; the claim that they were in the treaty was an impudent pretension. They were not within the treaty. The act was a gratuity, an indulgence, a kindness, a liberal donation—nothing more. Congress said: We will recognize it not at all as coming under the obligation of the treaty, for the committees said it did not. Inasmuch as it was cheapest to quiet the claim, as it was only $41,000, the committee concluded to report a bill, and allow the matter to be referred to the courts in Florida as commissioners to take testimony to ascertain by process of law, and certify what amount of injury was really sustained.

"Now, Mr. President, what do you think is the fact in relation to this matter? Since they have brought it up I will state it. Forty-one thousand dollars was the utmost that was alleged originally to have been due before the liberal act of 1834 was passed; and yet, so soon as the act of 1834 passed, swarms of claimants presented claims, and upwards of $2,700,000 was claimed. Upwards of $1,100,000 has been paid. Some of the patriot revolutionists or insurrectionists have preferred their claims, and have been allowed thousands of dollars! The United States is asked to pay all the losses on both and all sides, as well when the Spaniards and patriots were fighting and plundering each other, or when the Seminole Indians plundered either. This is fact, sir, proved by the record. There have been several reports in the Senate and the House in favor of paying the claims of 1814. They had little to do with these claims. There is more plausibility for saying the claims of 1814 were embraced by the treaty than there is for saying these claims are. The operations of 1814 were by authority of the United States, and by federal troops, and we may have been bound by the law of nations to pay some damages, but we were not bound to pay for the acts of the patriots, filibusters, Indians, and Spaniards of Florida in 1811, 1812, and 1813. Some of those reports contend that the claims of 1814 should be held to be within the treaty because they were later, and because Congress has held that those of 1812 were within it. This is a *petitio principii*. Congress has never

so held, and Congress has refused steadily to sanction those reports; so that they make nothing out of them.

"I am very sorry that they have brought up this subject. I do not intend to make an apology for speaking upon it. If it was supposed that it would go through the Senate without hearing my opinion upon it, or the opinion of the Judiciary Committee, they were mistaken. I have never known a claim with less justice, or one which, in my opinion, has less in it to commend it to us. There are agents, I suppose—persons interested in it—who urge it with a great deal of pertinacity. I know that many believe, because about $1,200,000 have been stated by the judges, who acted as commissioners, to be due, that interest ought to be given upon that sum. But, sir, I say the only parties who really had a right to avail themselves of the treaty of 1819 were those who suffered damages, if you choose to say so, by the operations of 1818. They have never claimed interest. Those who had no right, under the treaty, to claim at all have waited until they have got some foothold, as they think, by the liberality of the federal legislation, and make this claim for interest. They have got what they call a verdict—I am told that is the term they use—and they claim interest upon it. They had no right to the principal, except through the liberality of the legislature, and, after they have secured that, they have claimed more than those who were entitled under the treaty of 1819.

"My colleague upon the committee [Mr. PETTIT] has said something about the term 'due process of law' used in the treaty. I have stated, Mr. President, that I have Chief Justice Taney's opinion before me. He says, in regard to this due process of law, in so many words, that the judges to whom the acts of 1823 and 1834 referred these claims, were but 'commissioners,' whose decisions were under the control and supervision of the Secretary of the Treasury; and, sir, those who preferred their claims, and asked to have them allowed under the act, cannot gainsay the provisions of the act under which they ask relief, and have no right to require any other 'process of law' than that which was contemplated, and prescribed, and acted upon, under that very act. The process of law which gentlemen talk about, being prescribed under the very act by which these claimants prefer their demand, it stands as an estoppel to them. It was an act which was extended to them as a matter of liberality, and if gentlemen choose to read Chief Justice Taney's opinion, they will find that the very act under which these gentlemen claim prescribed the tribunal and the process of law by which their claims were to be decided. Yet, sir, after that tribunal has decided, they have an *apex juris*, a law that turns upon a point—upon a pivot. I am impatient when I hear it asserted that these claims are embraced by the treaty; and that, if they are, the acts of 1823 and 1834 do not afford a 'judicial process,' and next, that these parties can claim interest, as upon a judgment or verdict. I know I have not time to go into this matter fully; but I trust they have gained nothing by their motion, in bringing this before the Senate at this time of night. Let the claim go to the Court of Claims, if they have jurisdiction of it; but what court would decide in their favor, with Crawford and Rush, *and Chief* Justice Taney's adverse decisions? Secretary Guthrie and

Attorney General Cushing are also both adverse to this claim, as their report of last session shows. I do not include that of the majority of the Committee on the Judiciary, for I will not say that it is much authority.

"Mr. TOOMBS. Is there any other question involved in this amendment than that of whether the interest allowed by the courts ought to be paid? Is not that the only question that is presented to us? Is there any other?

"Mr. BUTLER. I do not know that there is any other. The amendment seems to include all the amount of principal allowed by the judges and disallowed by the different Secretaries of the Treasury since 1823; and there is about as much right to allow the deductions of principal as there is for allowing the interest for forty years past. The Secretary of the Treasury reported at the last session that the interest, up to last July, claimed, was upward of $1,500,000. There has been already paid $1,100,000 principal. If the interest was the only question it would be a pretty important one.

"But I have never heard of interest being allowed in cases of this kind, even if the claims were embraced by the treaty, much less if they were mere gratuities. I cannot do myself justice in going further into this matter; but since lawyers have set their judgments up in favor of this allowance I intend to go into it. I shall stand, perhaps, condemned if I do not. I assert the true principles of the case to be, that the claims are not within the treaty—that the act of 1834 was a gratuity—that interest cannot be claimed on losses of this kind—that donees, like these claimants, have no right, in law or equity, to interest; and that the Florida judges heard and awarded these cases as *commissioners*, and not as a *court*. It has been said, under the authority of Todd, that the judges of Florida could not be invested with judical powers as commissioners. In that case Todd undertook to claim from the judges, as commissioners, their decision allowing a pension under an act of Congress, and the Supreme Court said to him, you have no right to our action, because the 'court' have not been appointed as 'commissioners.'

"The Florida judge seems to think that he could not act as commissioner. If the position is taken that he could not act as 'commissioner,' how and in what capacity did he act? Was his proceeding to make awards an usurpation? Let them take the ground that he did not act as commissioner and I will put them at defiance at once, and say his awards were no decisions at all. By the acts of 1823 and 1824 the judges' awards were subjected to the revision of the Secretary of the Treasury. It must follow one way or the other. If they were commissioners they did not act as judges, and if they acted as judges they did not act as commissioners. The Supreme Court said they were commissioners, and not judges, not a court. I have their authority for that, and that their awards are not judicial decisions or decrees, subject to appeal.

"I have detained the Senate much longer than I expected, but I never felt more clearly convinced upon any one subject than upon this. I believe this claim is less founded in justice than any other which I have examined. I went into its examination upon the supposition that

it had in it some justice. I have had a great deal said to me upon the subject. I have been beleaguered and invested so closely that I had to lock myself up in my committee room. [Laughter.] But I think they have made a mistake, a great mistake, in having this matter urged for discussion here to-night.

"How much do they want us to pay? The claims, including those of 1818, presented to the judges up to this time, amount to about $2,700,000. The judges *allowed* about $1,199,000, and interest at five per cent. on each from the 10th of May, 1813, amounting to about $1,280,000 more; in all, $2,479,000. The Treasury Department allowed and paid about $1,106,000, deducting about $90,000, part of the principal, and all of the interest awarded by the commissioners, being, together, $1,370,000. The amendment proposes to pay the 'full amount of the damages decreed by the territorial judges, not heretofore paid.' The amendment refers only to the cases in east Florida, of 1811, 1812, and 1813. It does not include the west Florida claims of 1814 and 1818, amounting to some $85,000 more, of which about $25,000 was allowed and paid, and $12,000 deducted, and $48,000 disallowed as not being within the treaty; and this does not include any interest. These will come by and by.

"It is said that no specific appropriation is necessary in this amendment, as the acts of 1823 and 1834 contain a continuing appropriation, out of which the balance claimed, principal and interest, can be paid if allowed. If so, the claim has no business in this appropriation bill. It seems the amendment is broad enough to cover the whole amount awarded by the Florida judges, including the deductions made from the awards at the Treasury. This amendment, if it passes, will, I presume, cover about $1,370,000, being the amount awarded by the commissioners, principal and interest, after deducting the $1,106,000 paid. Then there is interest up to this time amounting to $250,000 more—not 'more or less,' but more. These claimants, I verily believe, never had a shadow of right, under the law of nations or any other law, or upon any principle of justice, to demand of the United States one cent of what they call the principal, much less any interest. What Congress has allowed them has been a gratuity, a gift, a donation, and nothing more. And they complain and ask for interest because it was not given to them sooner, and because the gift was not more liberal. Of all the persons in the United States preferring claims to Congres I believe these claimants have the least right. They have already got about $1,000,000 out of the treasury, under the act of 1834, though it was represented, to get that act passed, the whole amount did not exceed $41,000. Yes, sir! they have got this $1,000,000, and they have so run it through these technical funnels that I do not know what, in the progress of the business, they may make out of it. [Laughter.] The claim for interest upon the value of the property destroyed, or taken, or injured, is first founded on the word 'losses' in the treaty, and hence the judges allowed it in their award. The award of the judge is called a verdict or judgment, and then it is said the interest is due upon the claim awarded as upon a 'liquidated demand.' A doctor, it is said, once congratulated himself *when* he was told his medicine had thrown his patient into fits, and

exclaimed, 'I'—but I will not repeat the story. Sir, I do not think these claims have been, as yet, brought within the treaty; nor that, if they were within it, there is anything in the treaty, or in the acts of 1823 or 1834, that makes the judges' awards, either of principal or interest, final and conclusive; so that the revision by the Secretary of the Treasury, disallowing and deducting the principal when exorbitant, and the interest in all cases, is to pass for nothing; and that the claimants are entitled to have those disallowances and deductions, and all back interest paid to them. Such claim is preposterous. It is extravagant, sir, positively extravagant, and without reason, right, or justice. I regard it as one of those claims which is asserted with the idea that there is a congressional judgment different from that which would be pronounced by any other tribunal. Sir, I do not hesitate to say that there are many claims urged here which could not be urged anywhere else. I make no imputation, because there are differences of opinion among us; but there is a congressional chord which will give a response to anything styled a verdict that you could not find in any tribunal upon earth, governed by fixed rules of justice and right. I am sorry that I have taken up so much time, but I am positive upon this subject. If senators, however, mean to sustain this claim, be it so."

1. Whether the interest claimed in these cases is due, is made to depend, in the argument of the claimant's counsel, on the language of the treaty of 1819; and the argument fails if these claims are not embraced within the treaty. This is the position taken by Mr. Butler, and he maintains it by considerations which are unanswerable, in my judgment.

2. If the court should think otherwise, however, it remains to be considered whether the party has established his claim according to the laws passed to carry out the treaty. Mr. Butler treats of this also, and shows that these claims have not been established under those laws. I will present a few additional remarks on this last head.

3. I will add a summary of authorities on the subject of interest, to show, moreover, that nothing short of express words in a law directing the allowance of interest will authorize the officers of the government to pay it, no matter what may be the origin and nature of the claim, or the mode adopted to establish it.

The ground taken in the petition now under consideration, with respect to the effect of the decision of the judge of the district court in Florida, is the same as that presented in the Senate and discussed by Mr. Butler. The petitioner "represents to the honorable court," (see page 5 of the petition,) "that the estate of her intestate hath obtained, by process of law, a just and valid judgment, establishing the amount of the injury occasioned, by the operations of the American army in East Florida, to said estate, in the years 1812 and 1813, which, by the treaty and acts of Congress before stated, the Secretary of the Treasury was required to pay, and which the government is still bound to pay." I insist that the decision of the Supreme Court in the case of Ferreira, 13 Howard, p. 40, referred to in Mr. Butler's argument, settles conclusively the character in which the judge in Florida acted, and decides that the awards rendered by them were

not judgments; that the judges were not acting, in passing on the claims, in their judicial character, but as mere commissioners, whose awards, by the terms of the law under which they acted, imposed no obligations on the United States to pay until approved by the Secretary of the Treasury. The award made by the judges in the case now before the court was not approved by the Secretary of the Treasury. It was, on the contrary, disapproved—disapproved not only in respect to the interest allowed, but disapproved as respects nearly one-half of the principal sum.

When this decision of the Supreme Court was quoted in the House of Representatives by Mr. Orr, (see Congressional Globe, page 734,) for the purpose of which it is here presented, the friends of the claimants replied, that it was an *obiter dictum*, (see Mr. Stanton's speech,) and that may be said here again to impair its authority. It is not an *obiter dictum*. The question of the character in which the judges of Florida acted in passing on these claims was necessarily considered in deciding whether the Supreme Court had jurisdiction of the appeal before them. This is too obvious to be argued. As the case is here presented, the judgment of this court depends altogether upon the question which the Supreme Court have decided; for it is only as a valid judgment rendered by a court duly authorized to hear, and finally determine the amount due to the claimant by the United States, that it is presented to this court. Much indeed is said in the petition, and much may be urged in the argument, against the reasons given by the Secretary for disallowing the claim; but in the case, as here presented, we have nothing to do with such considerations. It is his authority to disapprove and to disallow, that is open to argument in this case. And that is a distinction it is important to the rights of the United States should be kept in the mind of the court. It is not technical merely, but is essential to justice. It will be assumed that these claims have been passed on judicially, under the 9th article of the treaty, and the effort will be made, as it has been heretofore, to turn the whole argument on the point of law whether the government should pay interest when it engages to make satisfaction for injuries to property; and learning has been exhausted to prove, that according to all systems of law—common and civil, national and municipal—that is the proper mode of making satisfaction in such cases. Congress has been warned, in the most friendly and feeling manner, not to fail to make such indemnity in this case, lest when it has occasion to call on other governments hereafter for redress, its own evil example with the Florida claimants will be turned against it. But all this, under the decision of the Supreme Court, is beside the question. We are not now called on to enter into the consideration of what satisfaction consists, on the assumption that we have agreed to make it, but to determine whether, under a particular law, entitled "An act for the relief of certain individuals," they have established a demand against the United States which the accounting officers ought to have paid. In looking into this question, we find that the Secretary of the Treasury, to whom the final decision of these claims was committed, refused to allow a portion of them. He was not bound to give any reason for his decisions, and probably did not give the whole reason. He no doubt saw what *we now see, that* Congress had been deceived into opening the treasury

to these claimants to help themselves out of it *ad libitam*, for such was and always will be the effect of a law which made the amounts to be paid dependent upon mere ex-parte testimony, especially where all in a community were alternately claimants and witnesses. It became a sort of scramble, but one in which the scramblers, so far from interfering with each other as in ordinary scrambles, helped each other the better to help themselves. All were interested in each case, for the prices proved must be the same in all, and every motive of good neighborhood and friendly feeling conspired with direct interest on the part of the witnesses to swell the claims.

The Secretary no doubt understood this. He endeavored in vain to correct it by sending back the awards in many instances, and directing the judge to take further testimony. He then docked off more than half the award in every case by the disallowance of interest, and in many cases, as in this, docked off still more. He probably did not state his true reason for this course, as it was unnecessary, and it was more prudent not to give a reason which would give offence to a community. The effect was precisely the same on the award as if he had said plainly, I disallow one-half these awards in every instance, because, from what I know of the country, it is evident that the extent of the losses is exaggerated in a greater degree in every instance. And he might have had any other reasons for disallowing so much of these claims—or he might have had no reason whatever; it is wholly immaterial, so far as the effects of his acts are concerned, whether he acted with or without reason in the premises. His power I maintain under the authority of the decision of the Supreme Court was unquestionable, and this court will not, under a petition stating as the ground of relief a judgment against the United States, hear an argument to show that if it is not a judgment, it ought to be considered as one by this court, because the officer whose duty it was to hear and determine the case gave an insufficient reason for not giving a judgment for the claimant.

If it is desired to bring to the consideration of this court the claim of these parties on their merits—to open the whole question of whether the law of 1834, which in its title is expressed to be for the relief of certain individuals, and does not purport to be like the act of 1823, an act to carry into effect the treaty of 1819, is to be regarded as subsidiary to the treaty, and not a gratuity, and it is desired that this court shall go into an examination of the facts, whether satisfaction for the losses has been made—we must not confine ourselves to the consideration of the acts of the Secretary of the Treasury, or of the judge, or assume that the acts of one set of officers are right and not open to question, and the acts of another set alone open to question. If it is maintained that by the treaty these claimants are entitled to indemnity, and that the machinery established by the laws of 1823 and 1834 has not accomplished that object, and the court is called on to see the contract of the government performed, that end cannot be satisfactorily accomplished, except by discarding all the proceedings heretofore taken, because the court cannot with any greater propriety assume that the proceedings of the judge were correct, than that those of the Secretary of the Treasury were correct. When it is said that the reasons of the Secretary for not allowing interest were insufficient,

and his judgments ought not to stand, although that was made the basis of all claim against the United States by the laws of 1823 and 1834, we reply, that the proceedings before the judge were ex parte, which naturally lead to excessive demands, and there would have been under such circumstances no safety whatever for the United States, except in lodging with the executive officer a discretion as to the amount he would pay. That, even with this condition, it was proved to be unguarded, and a most improvident act; but, without it, it would have been such an act of folly as no honest body of grown men would have adopted. That is manifest, as well from this consideration as from the whole history of these claims, that equity is not to be attained by deciding this case on any abstract legal question which may be raised on the reasons assigned for his judgment by the Secretary. Every disinterested and candid man, who considers the facts in this case, will be satisfied, I think, that these claimants have been largely overpaid already. In the first place, there were not over 5,000 white persons, of all ages, in the territory at the date of these transactions, making about six hundred and twenty-five families. Now, three hundred and seventy claims have been presented, three-fifths of the whole number, and more than there were proprietors, probably, in the province; about twelve hundred and twenty-four thousand dollars have been paid, about three thousand five hundred dollars apiece for every proprietor in Florida. The mass of these claims are for crops taken or destroyed, and for negroes, horses, hogs, and cattle, and some for crops not made, and some for houses burned. The amount is incredibly large. It is not credible that this poor Spanish province was so rich at that date. Some of the larger claims are for the destruction of immense crops of cotton, valued at fifty cents per pound. It is hardly credible that property of such enormous value should have been wantonly destroyed by the American army.

I refer to the court also the speech of Mr. Orr, before cited, for a discussion of the prices charged in these bills. In view of these prices, and of the incredible amount of property supposed to be held in this thinly settled Spanish province, and considering that the testimony was taken many years after the losses, amounts could only have been estimates which are ordinarily exaggerated; that it was altogether *ex parte* from neighbors, and by those, in most instances, like themselves, interested in like claims; and above all, that Mr. White, the counsel for the claimants, on the floor of the House, when asked by General McKay what would be the amount of these claims, stated that they would not exceed forty thousand dollars, (see his remarks in Congressional Globe of 23d Congress, quoted by Mr. Orr, Congressional Globe of last session, p. 735;) and I think it impossible to doubt that these claimants have already received indemnity probably ten times over their losses. It is, however, unnecessary for me to raise that presumption in the mind of the court to sustain the point I am endeavoring to enforce, which is, that if the court undertakes to go behind the record to decide upon the equities between the United States and the claimants, it will not answer to stop at the supposed error of the Secretary of the Treasury of disallowing interest, and in

that way disallowing more than half of each award. But we must begin *de novo* here in this court, and go through the whole investigation ourselves, discarding alike all the proceedings heretofore taken in the premises, if we discard any, for it is manifestly inequitable that a party should be permitted to make that portion of a record which favored his case evidence, and discard that portion which was against him. And I have referred to the evidence tending to show that these parties have been overpaid merely to illustrate more strikingly the unfairness of proceeding otherwise. But that is not within the scope of the petition before the court, which proceeds altogether upon the ground that by obtaining the *award* of the judge he has established his demand by "process of law," and that the disallowance of part thereof by the Secretary of the Treasury, although provided for by the very law under which the petitioner claims, was illegal and void. The decision above referred to in 13 Howard is conclusive of the case as presented. I cite also the opinion of Attorney General Cushing, (Ex. Doc. 82,) and the opinions of Attorneys General Crittenden, Legaré, and Nelson, therein referred to, and to be found at p. 333, vol. 5, Opinions Attorneys General, by Hall; Congress 2d do., p. 1392, 1420; Ed. of 1851, p. 1658.

On the subject of the claim of interest against the United States, it is to be observed, that the rules and principles which apply in the present state of municipal law to the relations of individuals have no application to the government. When a debt is ascertained to be due by one man to another, it is the general rule in the courts to allow interest from the date of its maturity, or from the time the money was improperly withheld; and this rule is so commonly applied that it is regarded as a necessary incident to the debt that it should bear interest. But even with respect to individuals this is not true; interest is not a part of the debt. It was unlawful both by the common and civil law prior to the sixteenth century, and is not now sanctioned by express law in England, and *eo nomine* no one is liable to pay interest, except by contract, express or implied. The existence of such an agreement is a question of fact for a jury under the direction of the court, and they are allowed to imply it from various circumstances, especially from usage.—(See 5 Cowen, 609.)

But with respect to the government in its dealing, there is no such usage; on the contrary, its usage is the reverse of that prevailing among individuals on this point, and the one usage is as much the law as the other with respect to the subject of it.—(U. S. *vs.* McDaniel, 7 Peters.)

As respects the fact that such is the usage of the government, see Opinions of Attorneys General, pp. 172, 1159, 1162, 1395, 1663, 1477–'78; 11 Op. 2012; Do. 2031.

These opinions are all in accordance with the language of Mr. Rush, (to be found in State Papers, vol. —, Claims, p. 423,) that special words in an act of Congress were always required to authorize the payment of interest: and the committee say in their report that this construction conforms to the intention of Congress. Nothing can be more conclusively settled than that it requires express language to a law to authorize the payment of it, and by express language interest

eo nomine is meant. Thus in the claims of the inhabitants of East Florida, which have been passed upon by several Attorneys General, the language relied on was the stipulation to make satisfaction for the injuries to their property, contained in the treaty with Spain of 1819.

It was argued with great power that satisfaction could not be made without payment of interest, to indemnify these people for the use of the property. But all the Attorneys General concurred in denying the claim, because interest was not provided for in the law—a construction settled by use so long established in the departments, and acquiesced in by the legislature, and declared expressly by committees to be in accordance with the intention of the legislature, as to have the force of law.

But it may be said we are not discussing the rules applicable to executive departments; we wish to find out those applicable to the action of Congress. It will not be controverted, probably, that interest is not payable by the executive departments, except where it is specially directed by law. But this rule for the construction of a law after it is adopted may be said to form no guide for those who have to make the law itself, and the question still remains to be decided in what cases ought Congress to make the special direction required to obtain interest.

The general principle which leads to the construction above stated, it will be found, has controlled in legislation. It has been recognized by Congress as well as the executive departments, and adhered to from the beginning of the government, that the government does not pay interest as the *mere incident* of a debt. The cases in which it has been paid stand upon peculiar circumstances; express contract, inability to pay principal, protection of its officers, where interest has been actually paid as offset, &c.

It may be that occasionally an act has been passed paying interest on a liquidated demand duly presented and not questioned; but there are very few of this kind, and I have found none where interest has been allowed for the delay on a demand, arising in consequence of its rejection or being of doubtful validity, either in Congress or by the executive officers.

I have examined all the acts specially allowing interest from 1789 to 1851, inclusive, and subjoin a list and abstract of them for the convenience of the court, and think it will be found useful in this and other cases.

Cases in which interest has been specially allowed by acts of Congress.

Laws U. S.

Vol. 6, p. 524. R. H. Harrison; under the resolution of Congress of of 1784.

" p. 537. Riddle, Bechtell, and Headington; on bill of exchange drawn by quartermaster at New Orleans, and not paid when duly presented.

" p. 552. Philip Slaughter; on commutation pay as captain in revolution.

Laws U. S.

Vol. 6, p. 514. John Laurens; on same, and for diplomatic services, as if funded under act of 4th August, 1790, ch. 34.
" p. 586. Walton and De Graff; on advances during revolutionary war.
" p. 560. James Morrison; as set-off.
" p. 560. Charles Wilks; same.
" p. 554. Ed. Willet; repayment of interest paid on bill of exchange.
" p. 574. Jos. Falconer's heirs; on loan office certificate (lost.)
" p. 622. Jos. Cooper; interest paid by him.
" p. 621-'2. Marcius W. Gilbert; money advanced during war.
" p. 863. Springfield Manufacturing Company; according to contract.
" p. 544. Thomas Triplett; commutation pay and interest as funded debt.
" p. 848. Converse and Rees; on post office drafts protested.
Vol. 9, p. 28. Gen. Green; on his bond executed during the war of revolution.
" p. 11. Christopher Green; under resolution of 1785.
" p. 11. General St. Clair; on balance due for revolutionary service.
" p. 20. Agnus McLean; same.
" p. 32. Gen. Kosciusko; same.
" p. 48. Fulwar Shepwith; advances during war.
" p. 50. Moses White; as on certificate of final settlement for services during revolutionary war.
" p. 51. John Coles; on demurrage under charter party.
" p. 56. Com. Murray; on account of interest, &c., on capture of Charming Betsey; 2 Cranch, 64.
" p. 57. Flinn, who was killed in bearing message to Indians; gives widow $518, and interest.
" p. 63. Capt. Little; prize money of the Flying Fish.—(See 2 Cranch, 170.)
" p. 65. Stephen Sayer; on balance due for services during revolutionary war.
" p. 72. Thomas Barclay; same.
" p. 72. Matthew Smith and Darius Gates; on purchase money of land on failure of title.
" p. 80. Daniel Cotton; on demurrage under charter party.
" p. 89. Moses Young; on balance for services during revolutionary war.
" p. 94. L'Enfant; on compensation for survey of Washington.
" p. 103. Captain Burnham; on ransom paid at Algiers.
" p. 110. Anna Young, daughter of Col. Durhee; on his half-pay.
" p. 116. Jared Shattuck; on judgment recovered of Captain Maley, of United States schooner Experiment.
" p. 117. Dixon and Murray; on final settlement certificates.
" p. 134. John Brevard; same.

Laws U. S.

Vol. 9, p. 141. Dennis Clark; on purchase money of land without title.
" p. 146. Rappeleyea; on loan office certificates.
" p. 146. Arnold; same.
" p. 150. Sands, collector, New York; on judgment recovered against, in execution of his official duty.
" p. 159. John M. Forbes; on money advanced.
" p. 166. Joseph Wheaton; on award against United States.
" p. 167. Alex. Roxburgh; on final certificate.
" p. 175. John Holkar; on loan office certificate.
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Classification of the cases in which interest has been specially allowed by act of Congress.

On examining the list it will be seen that it consists chiefly of cases in which provision is made to refund money and pay for supplies, arms, &c., advanced for the use of the United States, principally during the revolution, but occasionally during the war of 1812 and the Mexican war; and special provision for funding the debt incurred

to the officers and soldiers for services during the revolution, in cases where final certificates given by the army commissioner were lost, and for loan office certificates.

These payments of interest for advances, &c., during the revolution were by express contract; see resolutions 1776—1781. The act of 2d June, 1848, was similar in its provisions.

The final certificates for service by the army commissioner and loan office certificates were funded by act of 1790, as part of the domestic debt. The special acts above quoted provide for some which were lost or mislaid. Of the other cases, some are for payment of interest on bills of exchange drawn by officers duly authorized, and not paid when presented; on judgments obtained against officers in favor of individuals, incurred in the discharge of official duties; on credits or offsets to which officers and contractors were entitled, in pursuance of express contracts; in settlement of prize cases on money paid for land sold by the United States without title; on improper judgments, warrants, and seizures on awards against the United States by referees.

There are but few cases not reducible to these heads. In a few instances interest was allowed on what are called in the acts "liquidated demands," where there was no dispute about the compensation being due, but payment has been unreasonably deferred, although duly presented; but no case in which it was allowed on a demand rejected by the accounting officers as legal or withheld because of doubtful legality.

M. BLAIR, *Sol. U. S.*

IN THE COURT OF CLAIMS.

ON THE PETITION OF LETITIA HUMPHREYS, CLAIMING UNDER THE FLORIDA TREATY.

Brief of Solicitor on rehearing

The questions in this case may be disposed of under two heads of inquiry: 1. Whether the class of claims in question is provided for by the treaty. 2. If so, whether, on the construction given to the treaty by the claimants, by which it is insisted the United States undertook to pay the claims established *by process of law*, there have been any claims so established or any law enacted providing for such proceedings.

On the first point my former brief, adopting the argument of Senator Butler, and the report submitted by the Secretary of the Treasury, going over the same ground, is so conclusive that no attempt has been made to meet it.

The only argument offered on the other side is that the Spanish copy of the treaty does not contain the word *late*, which limited the stipulations of the 9th article to the injuries committed in 1818. Mr. Forsyth, one of the most accomplished statesmen and scholars, our minister for many years at the court of Madrid, explains, in his re-

port in 1825, that whilst the word *late* itself is not in the Spanish copy, the context implies the same meaning.

The reference is also to injuries done by *an* American army—not by several armies or on several occasions. Nor are the injuries complained of here—supposed to be committed by the volunteers under Matthews—properly speaking, the work of an American army.

However it be in Spanish, the meaning is plain in English; and, as it was an obligation undertaken by the nation using the English language, we have the right to insist that the plain words of our own language should not be overruled by any uncertain words in the Spanish language; and, accordingly, the treaty received this construction contemporaneously by the Secretary of the Treasury, with the sanction of Mr. Adams, who negotiated it, and by Mr. Monroe, the President, under whose authority it was negotiated.

An appeal was then made to Congress, and I took occasion, on the former argument, to read the reports of the various committees on this point to the court, including that of the committee by whom the act of 1834 was reported, all concurring in the correctness of the decision at the Treasury Department, that the claims it provided for were not embraced in the provisions of the treaty, and proceeding, in reporting a bill *for the relief of the claimants*, upon the express ground that the relief they proposed was granted in consideration of the circumstances of the case, and not in fulfilment of any treaty obligation, and on the assurance mentioned in the report, as given by the delegate from Florida, that not more than $100,000 would be required by the bill.

In the face of these facts it is contended that Congress, by this very act, not only granted relief to the claimants, but gave a legislative construction of the treaty, overruling the decision of the Executive Department, and of the committee which reported it. In other words, that whilst the committee were saying in the report which accompanied the bill that the treaty did not provide for the case, in the act which they report, and which was passed as reported, they say the reverse!

It is scarcely possible that this could be, and the language of the act ought to be very explicit to admit of such a supposition. But, on an examination of the language, no warrant will be found for it; and, so far from it, the very contrary appears. The only foundation for the argument, indeed, is the fact that the act adopts the machinery for the ascertainment of the claims allowed under it, which was put in force to ascertain those coming under the treaty, and allows the claims heretofore reported by the judge and rejected by the Secretary because not under the treaty, provided that the Secretary shall deem them just. So far from this being an overruling of the Secretary's decision, it is an affirmance of it. Before, it was not lawful to allow any not embraced in the treaty, (see § 2, art. 23, 3 Stat., 768;) whereas, by this act the Secretary is not so limited; but he is authorized to allow such of the awards as he thinks *just*, and they are not required, as by the former act, to be within the treaty.—(See act 34, 6 Stat., p. 569.)

For considerations entirely distinct from treaty obligations, which

are fully set forth in the several reports, Congress thought proper to allow, in 1834, the amounts reported by the judge in Florida, but which had been rejected by the Secretary of the Treasury, as the law required him to do, *because they were not within the provisions of that treaty*, provided the Secretary should deem them *just*. The act was, therefore, strictly in accordance with the reasoning of the reports—that it was just to indemnify the sufferers in 1812-'13, although they were not, in fact, embraced in the treaty stipulations; and the effect of the act was to strike out the condition of the act of 1823, that the claims should be within the treaty.

If anything could add to the conclusiveness of these considerations it would be the title of the act of 1834, which is *not an act further providing for the carrying into effect the treaty of* 1819, as it would have been if Congress had intended to recognize the claims there provided for as embraced in the treaty. The difference in the title from that of 1823 shows of itself the different footing on which the claims stood before Congress.

II. If we may suppose, however, that the claims before us come under the treaty, it is further necessary, in order to maintain the case of the claimants here, not only to show that the treaty provided for the payment of such demands as should be established *by process of law*, but that the demand in question has been so established.

Whether we adopt the construction given to the words of the treaty by the claimants in this respect, and admit that it was contemplated that the claims should be established by what is technically known as *process of law*, or construe the treaty as Congress did—as authorizing an examination of the claims by a judge at his chambers, who should report the evidence and his opinion of each case to the Secretary of the Treasury for his revision—is alike immaterial, so far as the result on the case here is concerned. For, under his construction, nothing has been done, or all that has been done is irregular and void; and on the other construction, the tribunal actually constituted has decided against him. The scheme is to get rid of the doings of the Secretary, because they are against the claimant, and leave the action of the judge standing, because that was for the claimants. To do this, it is insisted that the treaty stipulated there should be paid what should be established by *process of law*, which, it is insisted, were proceedings in which, by the Constitution, a Secretary or executive officer could take no part, because the Constitution had vested the judicial power in the Supreme Court, and in such *inferior courts*, &c.; that it is inconsistent with this distinction, established by the Constitution, to permit a Secretary to revise the judgments of a court, &c., &c.

But here we have not the judgment of a court, but *ex parte* examinations taken at the chambers of the judge, reported to the Secretary with the judge's opinions on the facts so proved. Whether it is admissible to impose such duties on a judge, it is unnecessary to inquire. It is very certain, I think, that proceedings of a similar character affecting the rights of individuals would be held invalid and of no effect. For example, if any one of the supposed sufferers by General Matthews' proceedings in Florida should have sued him for trespass,

as Mitchell was sued by Harmony, it would not avail to show that the judge had acted in his chambers on that claim and decided against it.

It does not advance the case to show that the treaty contemplates proceedings in court, over which the Secretary cannot constitutionally exercise supervision, unless such proceedings were provided for by law, and are shown to have taken place, and the record of them is produced. Because, unless the *law* provided for carrying out the treaty in this respect, and the courts have executed it accordingly, it is of little moment what the passage in the treaty means. But the law does not provide for the institution of suits, and the proceedings under it were not of the character described by the term *process of law*. (See this point discussed in the case of Ferreira, 13 Howard, p. 47, et seq.)

To make the record produced of any effect, as evidence of proceedings under the treaty, it is necessary for the claimant to relax the strict meaning of the words; and when this is done so as to admit that they may be satisfied by the action of a judicial officer *out of court*, there is then certainly no constitutional difficulty in the revision by the Secretary, because the judicial power spoken of in the Constitution, which is exclusive, is that *lodged in the courts*. Besides, the decisions in Yale Todd's case, reported in the note to Ferreira's case in 13 Howard, pp. 48–52, as well as the opinion in Ferreira's, declares that such an inquiry as was here committed to the judges was not a judicial function which could have been constitutionally devolved on the court, the inquiry being there as here an *ex parte* inquiry proper only to commissioners.

It is then clear that if the treaty was only to be satisfied by a proceeding over which the Secretary should exercise no supervision that no such proceedings have been shown.

As respects the proposition that the Secretary was merely directed to pay the awards, and that he was not made by law the revisor of the proceedings of the judge, it seems sufficient to refer to the language of the act of 1834, authorizing payment of the awards "*on all cases where the decision of said judge shall be deemed by the Secretary of the Treasury to be just.*" Of course the Secretary could pay none of the awards he did not think just, and unless he revised the decisions he could know nothing about the justice of the claims.

No allusion is made to this language in the argument in support of the proposition, but the effort is made to maintain it by reasoning exclusively on the second section of the act of 1823, and assuming it as intended to carry into effect the treaty both as respects the claims and as to the particular mode of establishing them. As the treaty speaks of "*process of law*," and the act speaks of "adjudging," and "adjusting" "agreeably to the provisions of the treaty," and "judges" to decide, it is thought to be plain that nothing but judicial proceedings are meant; and although the act declares "these decisions with the evidence on which they are founded shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged," these words are not to be permitted to give a revisory power to the Secretary, because, if so, the action of the judge would in

that case not be judicial. The amount of the argument is, that the treaty required the claims to be established judicially, and that cannot be said if the Secretary has any authority over the decision; and the act, to be construed consistently with this, must be construed so as to let him look only to the jurisdiction of the judge, and so the words of the law, "just and equitable," go for nothing.

Those with respect to reporting the evidence are in like manner for no purpose, because it is never necessary *in judicial proceedings* to report the evidence to ascertain whether the court has jurisdiction. The proposition contended for plainly nullifies the second section of the act of 1823, as well as the provision quoted from the act of 1834, under which this claim arises, acted on without question till lately by every Secretary since 1823.

It is said, however, that this court may entertain the petition if the treaty has not been fulfilled, because the government had entered into a contract by the treaty, the enforcement of which devolved on this court by the act creating it.

But it has been more than once decided by this court, following the decision of the Supreme Court, in 6 Peters, (see Thomas' case,) that it was incompetent for this court to revise the action of other tribunals to whom, as in this case, the decision of specific questions had been committed by Congress.

It is not proposed to ignore the act of 1834 and the proceedings under it. Not at all. The argument is, that the treaty has not been fulfilled, because, according to the principles of the laws of nations, an agreement to make satisfaction for injuries includes both payment of the amount of the loss and interest thereon till paid; and when we look into the record we find the Secretary refused to pay interest, and it is said he might with equal propriety have refused to pay principal. With equal reason it may be urged that some of the claims rejected altogether, if there were ever any such—I confess, however, I have never heard of any such—must be allowed, to fulfil the treaty. But the law has committed the discretion to the judge, subject to revision by the Secretary, to decide on the amount necessary to make the stipulated satisfaction; and the law establishing this court has not made it a court of error to revise the acts of such tribunals, either as to the facts on which they have proceeded or the principles by which they have been governed; and it is as true now as when the opinion in Ferreira's case was written, that there is no tribunal to review the decision in such cases. What induced the Secretary to cut off interest and part principal, as Mr. Woodbury did in this case, after the patient investigation, as the notes on the record in his handwriting, throughout, show that he made personally and critically, it is not for us to inquire. He probably understood the whole subject fully as well as we ever shall, and, I have no doubt, much better than Mr. Corwin did when he allowed the part of the principal which Mr. Woodbury, after such careful sifting and comparison of the testimony, had disallowed. Mr. Woodbury was bound to allow only what he was satisfied *was just*, no matter under what name it was claimed, and I am sure he allowed all he thought was *just*.

It is not asked that all the proceedings under the law should be held

for nought, and that the court should proceed to the consideration as if nothing had been done, but only that not enough has been done. What I have said in my former brief on this point I commend to the attention of the court. Whenever the money paid shall be refunded, and a judicial investigation asked, I should favor an act granting such an investigation and paying all that can be proved under it.

The character of the testimony and proceedings, and the amounts already obtained from the treasury, can leave no doubt on any one's mind that the claims have been more than ten times overpaid; and I hope the court will not accede to the request made to express any opinion on any abstract question as to interest, or on any point not called for by the case.

No claim for interest was pressed in these cases till the principal was, by dint of importunity, obtained from the successors of Mr. Woodbury, who illegally set aside his judgments and allowed, without any additional evidence, and I have no doubt without considering all the evidence already in the department, amounts which he, upon patient and laborious investigation, had rejected.

This was contrary to law and the settled usages of the department, not to open the decisions of prior incumbents of the office without new proof.

Notwithstanding this evident favoritism, there was yet not quite courage enough in those who thus set aside Mr. Woodbury's judgments on the principal sums allowed by the Florida judge, to set aside his judgment on the interest. But the scheme of bringing the question before the Supreme Court was connived at by the department, in pursuance of which the district attorney took the appeal in Ferreira's case; and the character of the proceeding is illustrated by the singular circumstance that the appellee who moves to dismiss the appeal for want of jurisdiction in the court, argues against his own motion, and whilst Mr. Crittenden, the Attorney General, saying he knew not how the case got there, argued in favor of the motion of the defendants to dismiss it. The court granted their motion, however, and proceeded carefully to pass upon their arguments, and overruled them; and it is this decision in a case thus brought up by themselves, and upon which they invited the decision of the Supreme Court, no doubt with the understanding that if the court gave a favorable opinion they should have the money, which they now except to, because, contrary to their expectations, the Supreme Court decided against them. Aside from the great authority of the court, there is a reason special to the case which ought to make the decision obligatory. It is a breach of faith to renew the claim here, because, when they had been permitted to get the decision of that court upon it, with an agreement to pay if the decision was in their favor, the circumstances imply an agreement to submit on their part; and whether such an agreement was in fact made or not every fair-minded man would say they should be bound by the decision.

M. BLAIR,
U. S. Sol'r.

ROBERT HARRISON *vs.* THE UNITED STATES.

Judge Gilchrist's opinion.

This case comes before us by virtue of a resolution of the Senate, referring to this court the memorial of the claimant with the papers on the files of the Senate relating thereto. The question is the same as that heretofore presented in the case of Letitia Humphreys, and decided by this court. The opinions heretofore delivered by Mr. Justice Blackford and myself in that case sufficiently state the grounds on which that decision was made, and we refer to them for the expression of our views.

In the dissenting opinion of Mr. Justice Scarburgh, he expressed the opinion that the word "satisfaction," in the 9th article of the treaty with Spain, of the year 1819, bound the United States to pay the actual value of the property lost by the claimant, and the interest on such value by way of damages.

In the opinion which I delivered in the case of Letitia Humphreys, I stated that I was inclined to agree with the views of Judge Scarburgh in relation to the meaning and effect of the word "satisfaction" in the treaty. In saying that, I expressed only my individual opinion, and not the opinion of my much respected associate, Mr. Justice Blackford. As I have already intimated my opinion, it may not be improper for me here to state that I adhere to that opinion ; and that if the question came properly before us, I should say that the claimant was entitled to the interest on the amount of his loss as ascertained by the territorial judge. But that opinion cannot affect the decision of this case, as the rights of the claimant must depend upon the construction of the acts of Congress, and not upon the stipulations in the treaty. Our views upon the question have already been expressed, and our conclusion is, that the claimant has no legal cause of action.

LETITIA HUMPHREYS *vs.* THE UNITED STATES.

Opinion on the re-argument by Chief Justice GILCHRIST.

By the 9th article of the treaty with Spain of the 22d of February, 1819, (8 St., 260,) it is provided as follows:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

On the 3d of March, 1823, (3 St., 768,) an act was passed entitled "An act to carry into effect the 9th article of the treaty concluded between the United States and Spain the 22d day of February, 1819."

The first section provided "that the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States."

The second section enacted "that in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury, not otherwise appropriated,"

Mr. Secretary Rush held that the words in the treaty, "the late operations of the American army in Florida," included only the injuries sustained in the years 1818 and 1819, and that the injuries sustained in the years 1812 and 1813 were not provided for by the treaty, and he refused to pay any claims for injuries sustained in those years.

On the 26th of June, 1834, (6 St., 569,) an act was passed providing that the Secretary of the Treasury should pay the amount awarded by the judge of the superior court at St. Augustine, under the act of March 3, 1823, for losses occasioned in East Florida in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just.

The second section provided that the judge be authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid in 1812 and 1813 not before presented to him, or in which the evidence was withheld in consequence of the decision of the Secretary that such claims were not provided for by the treaty of 1819, provided they should be presented to the judge within one year from the passage of the act.

The effect of this act appears to have been to authorize the claims *for losses* to be paid which were rejected by the Secretary of the Trea-

sury in consequence of his construction of the word "late" in the treaty.

When Florida was admitted into the Union as a State the jurisdiction of the claims referred to was conferred upon the district court by the sixth section of the act of February 22, 1847.—(9 St., 130.)

In the present case, the territorial judge in Florida, on the 15th day of August, 1839, certified his decree in favor of the estate of which the claimant is administratrix, for the sum of $3,800, with an interest of five per cent. from the 10th day of May, 1813. The sum of $3,800 has been paid at the treasury, but the payment of interest has been refused, and the question is, whether the claimant is entitled to the interest.

In the able and thorough discussion which has been had in this case, much was said concerning the extent of the powers of the Secretary under the acts of Congress relating to this subject, and it becomes necessary to examine them with care in order to ascertain their meaning.

The second section of the act of 1823 provides that the decisions of judges, with the evidence on which they are founded, shall be reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof.

It is contended by the claimant that the only power of the Secretary was to ascertain from the evidence whether the claims were within the provisions of the treaty, that is, that the claimant was a Spanish subject and not a citizen of the United States; that the injury was occasioned by the operations of the American army, and not by other causes.

No authorities need be cited at this day to show that an act must be so construed that the whole of it shall be carried into effect if possible.

Now, if the authority of the Secretary were confined to determining whether the claim came within the provisions of the treaty, the words "just and equitable" might have been omitted, and were mere surplusage. The act would then read, that the Secretary, "on being satisfied that the same is within the provisions of the treaty, shall pay the amount thereof." It is admitted that the Secretary has a certain duty to perform in relation to the decision of the judge besides paying its amount. What reason is there for determining that his duty relates to the question whether the claim is within the provisions of the treaty rather than to the question whether the claim is just and equitable? Whether the claimant was a Spanish subject, and whether his losses were occasioned by the American army, are certainly questions as easy of decision as the justice and equity of his claim. Why should a supervisory power be vested in the Secretary upon one point rather than upon the other? Now, the words "just and equitable" have a definite meaning. They express the qualities of the claim. We cannot suppose that they were inserted at random, thoughtlessly, and without the intention that any effect should be given to them. We can perceive no grounds on which any court of justice could reject them. All precedent, all reason would be against their rejection.

We cannot discard them unless they are destitute of meaning, or are at variance with the evident purpose of the act.

Further, if instead of the words "just and equitable, within the provisions of the treaty," the language had been "justly and equitably within the provisions of the treaty," there might have been some ground for saying that such words meant only that the Secretary should determine whether the claim came fairly and properly within the treaty, upon a consideration of the evidence. But it is sufficient to say that such is not the language used. The words "just and equitable" have, in our view, a definite meaning of themselves. They have no connexion with the question whether the claim comes within the provisions of the treaty. They require the Secretary to determine whether the claim is just and equitable, and whether it comes within the provisions of the treaty. And the decision of one point is as necessary a part of his duty as the decision of the other.

Now, it is not denied that the Secretary is authorized to determine whether the claim is within the provisions of the treaty. The judge, by deciding in favor of a claim, decides that it is within his jurisdiction. The Secretary may review and re-examine that decision, and may determine that the case is not within the provision of the treaty, and therefore not within the jurisdiction of the judge. If he should reject the claim for that reason, he would render the decision of the judge entirely nugatory. Is there any reason for saying that Congress put it in the power of the Secretary to reject the claim altogether, because it did not come within the jurisdiction of the judge, and yet denied him the power to reject it on the ground that it was not just and equitable? We cannot perceive why the one power might not as properly be given him as the other; and why there was any reason for giving him a supervisory power over the question of jurisdiction, and denying him the same power as to the justice and equity of the claim. Moreover, whether the facts proved bring a claim within the provisions of the treaty is a question of law. Whether upon the facts proved, the claim is just and equitable, is not a question of law. The claimant's construction would amount to this: in relation to the question of law upon which the decision of the judge who is appointed to perform that duty may be presumed to be correct, the Secretary has the power to reverse his decision. But in relation to the equity and justice of the claim, which is not a question of law, and about which two equally honest men may reasonably differ, the decision of the judge is final. This is the conclusion to which, as it seems to us, the claimant's reasóning inevitably tends; and upon the question of the reasonableness of such a conclusion, it does not appear to us to be sound.

This claim was presented under the provisions of the act of 1834. That law, as we have seen, required the claims to be paid "in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just."

Now it is evident, that, laying aside the act of 1823, and any bearing it may have upon the meaning of the word "just," there can be no doubt as to the power of the Secretary. If he does not deem a claim to be "just," he is not to pay it. The meaning of the word "just," in this connexion, differs but slightly, if at all, from the meaning of

the words "just and equitable" in the act of 1823. A just claim is also a just and equitable claim. The justice here referred to is that distributive justice which consists in deciding controversies according to the laws and to principles of equity. Such is also the proper construction of the words "just and equitable;" and so far as the words relate to the character and quality of the claim, we can see no difference in the effect of the two acts.

But it is agreed that the two acts, being *in pari materie*, are to be construed together, as if they were one law, and that the word "just" in the act of 1834 means "just and equitable, within the provisions of the treaty," according to the act of 1823. Admitting this to be true, and it is not necessary for us to deny it, it does not help the argument, for the question still recurs as to the meaning of the act of 1823.

This view of the meaning of the act is corroborated by the opinion of the Supreme Court in the case of Ferreira, 13 Howard, 47, where it is said that the claim is to be paid, "if the Secretary thinks it just and equitable, but not otherwise."

As a further illustration of our views upon this point, it may be added that a claim may be within the provisions of the treaty, and yet may not, as preferred, be just and equitable. That is, a claimant may prove that he was a subject of Spain, and that he suffered losses by the operations of the American army in Florida in the years 1812 and 1813. Upon a consideration of the evidence, the judge may be of opinion that the claimant has suffered losses amounting to the sum of $1,000. The opinion of the Secretary may be that the claim is not "just and equitable" for that amount, but that it is so for the sum of $500. Now, it appears to us that if the Secretary, upon examining the evidence should be of opinion that it would not be "just and equitable" to allow the claimant more than $500, it would be his duty to reduce the claim to that sum, notwithstanding the decision of the judge. It is only in this way that, in our opinion, the proper effect can be given to the words "just and equitable;" and unless this effect be given them, they might, as we have intimated, as well have been left out of the act altogether. Moreover, as the evidence on which the decisions are founded is to be reported to the Secretary, it must be for the purpose of enabling him to examine and act upon it. If the claimant's construction of the act be correct, only so much of the evidence as relates to the question whether the claimant comes within the provisions of the treaty need be reported to the Secretary, for it is upon that only that he is to act. This would require us to say that, notwithstanding the language of the act, the judge might report only so much as relates to that question—a discrimination which we certainly have no authority to make, beause the act requires the evidence, that is, the whole evidence, to be reported.

Our construction of the law, therefore, is, that it was competent for the Secretary to reduce the amount of the decision of the judge to such a sum as he should deem "just and equitable," and that in rejecting the interest he did no more than he was authorized to do by the act.

The 2d section of the act of 1823 provides that the Secretary, on

being satisfied that the decision of the judge is "just and equitable," "shall pay the amount thereof." It is argued that this last expression refers to the decision of the judge alone, and directs the Secretary to pay the amount of the decision.

Now it may be admitted, that, according to the strict grammatical construction of the sentence, the words "the amount thereof" do refer to the decision of the judge; and if the rules of grammar were also the invariable rules of construction to be applied in order to ascertain the meaning of a statute, the position of the claimant would be correct. But if, as we have endeavored to show, the Secretary is to determine whether the claim allowed by the judge be "just and equitable," the words directing "the payment thereof" must be applied to the decision of the judge, only *sub modo*, with a limitation, and must mean the amount of the decision, as limited and reduced by the Secretary. These words must be construed in reference to the meaning of that part of the section which precedes them. They have not, of themselves, such a controlling power as to deprive the words "just and equitable" of their efficiency, and mean only that when the claim has passed under the supervision of the judge and of the Secretary, the amount finally ascertained to be due shall be paid according to the provisions of the act.

We come now to the consideration of the treaty, as it may be remarked that, whatever else may be predicated of it, it is clear that it is nothing more nor less than a promise on the part of the United States that they will do a certain thing—that is, that they will cause satisfaction to be made for the injuries therein mentioned. Of itself, the treaty creates no tribunal, and authorizes no person whomsoever to take cognizance of any claim for such injuries. It was left to the legislature to determine upon whom the duty should involve of investigating and deciding upon the claims. It will hardly be contended that, in the absence of an act of Congress, any court in the Union could entertain jurisdiction of the subject-matter of the claims. It follows, then, that it is to the act of Congress, and to that alone, that we must look for the jurisdiction conferred upon the territorial judge in Florida. The promise made in the treaty was by the United States to Spain. If Congress has failed to keep that promise, it is Spain only, the other party to the contract, who has any right to complain, or to call the United States to account.

In the case of Foster *vs.* Neilson, 2 Pet., 314, 8 Curtis, 121, Chief Justice Marshall says: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the

political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court."

Upon this point the reasoning of the Supreme Court in the case of The United States *vs.* Ferreira, 13 Howard, 40, (19 Curtis, 373,) seem to us incontrovertible. It is there said: "The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty, and Congress had the right to regulate its proceedings and limit its power and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so."

"Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding, or the character in which the law authorizes it to act, under any opinion it may entertain that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law, and must obey the law."

Now, it appears to us that the reasoning of the counsel for the claimant, in relation to the character of the tribunal in Florida, is unsound. It is assumed that, because the United States have promised that they will make satisfaction for the injuries which by process of law shall be established to have been suffered, and because the act of 1823 was intended to carry the treaty into effect, therefore the act must be construed with reference to the words "process of law" in the treaty, and the tribunal in Florida must be a judicial tribunal, whatever power of revision may be vested in the Secretary of the Treasury. The argument makes the ninth article of the treaty the paramount law of the case. Now this ninth article is not incorporated into the act, and the judge must examine it only for the purpose of ascertaining what injuries those were of which he was to take cognizance. If the claimant were a Spanish subject, and sustained injuries by the operations of the American army, the judge might examine further, and award such a sum as he considered "satisfaction" for the injuries he had sustained. But whether his decision was final—whether it was a *judgment*, in the strict sense of the word—was not a legitimate question for his consideration. It was not necessary for him to determine whether the words "process of law" did or did not mean that the proceedings and decision must necessarily possess all the elements and attributes of a judicial proceeding. And we do not understand that Judge Bronson, in his opinion, which is certainly the work of an able and investigating man, considers that this question is within his province. So far, then, as related to his duties, the words "process of law" did not require his examination, and the treaty in that particular could not for him furnish the paramount law of the case.

But the position is taken that the awards made by virtue of the act of 1823 are judicial decisions, because the injuries are to be established by "process of law." The words "process of law" are supposed to give the character of judicial proceedings to any mode which might be adopted of ascertaining the amount of the injuries. The argument proves this, or it proves nothing. If a person styled commissioner had been appointed to examine the claims, and the results of his inquiries had been styled "awards," and a power to revise them had been given to the Secretary, still, if the title of the act of 1823 had been retained, this reasoning would equally prove that the awards must be *judgments*, because the treaty provided for a "process of law." It is necessary to assume that the decisions must be *judicial* decisions, in order to make the deduction that no power to revise them can be given to the Secretary. But one of the strongest reasons for holding that the decision is not the judgment of a court of justice, is, that it is to be reported to the Secretary, with the evidence on which it is founded, and that the Secretary, who is not a judicial officer, is to revise it. He is a judicial officer only in the sense in which every one is a judicial officer who, in the discharge of his duty, is bound to exercise his judgment and discretion.

Now let it be admitted, for the sake of the argument, that the position of the claimant is correct, and that Congress were bound by the ninth article of the treaty to constitute a court of record for the purpose of establishing the injuries which had been suffered, and that they intended by the act of 1823 to constitute such a court as the treaty required. Admitting all this, still the question recurs, have they done what they intended? To this we must answer, that they have not; *quod voluerunt, non dixerunt.* We must still look to the act constituting the tribunal, in order to understand its nature and character. "Certainly," as is said in the case of Ferreira, "the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law, by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal."

We have referred to the case of the United States *vs.* Ferreira, 13 Howard, 40. Of the decision in that case, we desire to remark that the reasoning of the court, so far as we have had occasion to quote it, commends itself to and satisfies our judgment. For our present purpose, it is unnecessary for us to determine how far this court is to be considered as one of the "tribunals inferior to the Supreme Court" in the sense of the Constitution, or how far the decisions of the Supreme Court are binding authorities upon us. But we think every rational mind would agree, that, except in a decision which we should see clearly was manifestly erroneous upon an important question, it would be better for the republic that the judgments of that tribunal should be held to be final, that there may be an end of litigation. We can by no means agree to the position taken by the claimant that the doctrines stated in the opinion in the case of Ferreira are extrajudicial, and that the reasonings of the court are to be regarded as mere *obita*

dicta. It is urged that the decision is legal authority only to show that the court had no jurisdiction, that being the question before the court. It follows, then, that even if it should be necessary to demonstrate the truth of certain propositions, in order to show *why* the court had no jurisdiction, no statement by the court of any principle, however deliberate and well considered, is entitled to any weight. It follows, also, that the reasoning of the court by which they are led to the conclusion is always to be rejected as author.ty, and the conclusion only is to be adopted. Such a position, we apprehend, is entirely at variance with the practice of the courts and of the bar in England and America. It is not uncommon, and it is often highly beneficial, for courts to determine the material point in a case upon one, two, or three grounds. It is by no means the understanding of the legal profession that, because in such a case the court might have settled the question upon one ground, therefore the opinion of the court upon the other grounds is to be regarded as extrajudicial. In the case of Ferreira, whether the court might or might not have reached their conclusion by a different process of reasoning from that which they adopted, we cannot assent to the position that the reasoning which they used is to be regarded as extrajudicial.

We do not think that we can look beyond the acts of Congress which authorize the territorial judge and the Secretary of the Treasury to investigate and pass upon these claims. Under the treaty alone, without an act of Congress, no tribunal would be authorized to act. If we say that the Secretary has no power to revise the doings of the judge, where are we to stop? The result would be, and that is the effect of the argument, that for all substantial purposes he is to take the decision of the judge as final and conclusive upon him. This might be very proper if Congress had seen fit so to enact. But it seems to us that the act gives him an authority as substantial, as difficult to be ignored or lost sight of, as that which it gives to the judge. Whether the act does in reality carry out the treaty is not the question before us. It may or may not accomplish the object intended, but, perfect or imperfect, it is the only basis on which this claim rests, so far as any judicial action or quasi-judicial action is concerned. We cannot make the law, but must take it as we find it existing. We can perceive no legitimate mode of avoiding the conclusion, that the merits of this claim were to be submitted to the Secretary of the Treasury for his decision, and that such decision upon the justice and equity of the claim was final, and that he had a right to reduce the amount reported by the judge, either by striking off the interest, or a part of the principal, or both of them.

With these views it is unnecessary for us to consider the question whether the word "satisfaction" in the treaty entitles the claimant to interest, or whether the mode provided by the act of Congress for the settlement of the claim is such a "process of law" as the treaty contemplates, and our opinion is, that the claimant has established no cause of action against the United States.

At the same time I am willing to state that the inclination of my mind is, to agree with the views expressed by Judge Scarburgh, in his dissenting opinion, in relation to the meaning and effect of the

word "satisfaction" in the treaty. The reason why I have not expressed my views on that point in this opinion is, because it appeared to me that the decision of this case must be governed by the acts of Congress rather than by the stipulations of the treaty.

LETITIA HUMPHREYS, ADMINISTRATRIX OF ANDREW ATKINSON, DECEASED,

vs.

THE UNITED STATES.

SCARBURGH, J., dissented.

My former convictions being rather strengthened than weakened by the reconsideration of this case, I am under the necessity of again dissenting from the judgment of the court. In the opinion which I delivered at the hearing of this case, I set forth very much at large the grounds on which it is founded, and should now content myself with a mere reference to it for the reasons on which my present dissent is based, but for the consideration that the opinion now delivered by the majority of the court turns mainly on one of the points which I discussed at some length in my former opinion, and a becoming respect for my brethren requires that I should briefly state why I do not concur in their views.

In my former opinion, I adopted as sound and correct the following propositions:

I. That this case is embraced by the ninth article of the treaty.

II. That by the ninth article the United States stipulated to provide a *judicial* tribunal before which the injuries therein contemplated should be established.

III. That the United States, in stipulating that they would cause satisfaction to be made for those injuries, undertook to pay the sufferers, not only the actual value of the property lost, but interest on such value, by way of damages, for the loss of the use of the property, from the time the injury was committed.

IV. That upon the judicial establishment of the injury, the United States became absolutely and unconditionally bound to pay its pecuniary value thereby ascertained, to wit: *the amount* of the judgment.

V. That by the acts of 1823 and 1834 provision was made by Congress to carry the ninth article of the treaty into effect, in accordance with these views. And—

VI. That the judgment on which the present claim was founded, having been rendered by a competent tribunal, the injury complained of was thereby judicially established, and, thereupon, the United States became bound by the faith of treaties as well as by the judgment itself to render full satisfaction therefor.

And hence I deduced the conclusion that the petitioner is entitled o relief.

The judgment of the court now to be entered rests, as I understand it, entirely upon the ground that the acts of 1823 and 1834 invested the Secretary of the Treasury with the power of revising and correcting, at his discretion, the decision of the judge; and that the action of the Secretary of the Treasury thereon is final and conclusive. But I understand the presiding judge to state for himself that the inclination of his mind is to agree with the views expressed in my former opinion in relation to the meaning and effect of the word "satisfaction" in the treaty. Such being his opinion, a majority of the court at least concur in saying that the petitioner has not received all that she is entitled to; and if this be true—and that it is, it seems to me, cannot be successfully controverted—the result must be that she will lose her claim, not because it is not justly due her, but for some other reason, which excuses the United States from liability, but does not satisfy the debt!

There can be no doubt that it was the duty of Congress, in the enactment of a law to carry the ninth article of the treaty into effect, to provide (1) a tribunal before which the injuries contemplated by it might be established; and (2) that when established, due satisfaction thereof should be made. And to my mind it is equally clear that the tribunal contemplated by the treaty is a judicial tribunal. The first of these objects is provided for in the first section of the act of 1823, and the second section of that act provides for the second object. That the first section, if it stood alone, does abundantly provide for the first object, and constitute a judicial tribunal for its accomplishment, has never been, and cannot be controverted. It is clear beyond dispute. The words used not only warrant, but require such a construction. By it full force and effect are given to each word, and each word is understood according to its ordinary meaning. And not only is this true, but a different construction would be opposed to the ideas of Congress in the enactment of the law, and wrest their words to a meaning contrary to their intention. It is, I respectfully submit, because due attention has not been paid to this view of the subject, that undue weight has been given to the words "just and equitable" in the second section, and an erroneous construction of the whole law has been adopted. Whilst it is strenuously insisted that those words must be interpreted in their strongest and most latitudinous sense, it seems to be forgotten that the effect must be to put upon the words of the first section a construction which they do not naturally bear, and thereby defeat the professed object of the act. And this, strange as it may seem, is done under the erroneous impression—I state it with the most deferential respect for those who differ from me—that it is rendered necessary by that sound rule of construction which requires a statute to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant; (6 Bac. Ab., 380;) whilst, in truth, it results in a direct violation of that rule, for it not only perverts, but sets aside the plain words of the first section of the act. It disregards, too, another rule, equally sound and equally philosophical, which requires that, in determining the meaning of the words, *all* the parts of the statute are to be compared, considered, and construed, with reference to each other. One part of a

statute must be so construed by another, that the whole may, if possible, stand: *ut res magis valeat, quam pereat.* Hence general words may be restrained, and clauses controlled by clauses; and hence the suggestion, not only of reason and justice, but of law, that the words "equitable and just" are to be construed with reference to their *connexion* and their *relation* to other words, and to the *object* of the statute. It may not be improper, in this connexion, to suggest that the second section is merely subsidiary to the first, and hence, so far from being allowed to control it, must, if necessary, yield to the first section. The object of the first section is to establish the injury and perfect the obligation of the United States to satisfy it, whilst the second was designed merely to carry this object into effect. The first provides the judgment; the second, the execution.

It seems to be considered that inasmuch as the words "just and equitable" have a definite meaning, they must confer upon the Secretary of the Treasury the power of revising the decision of the judge. This view of the subject, I most respectfully suggest, is based upon the erroneous assumption that, under it, a sense is attached to those words different from that which is given them in the construction which I have adopted. The only difference between the two constructions, in this respect, is to be found in the application of those words. In the one, they are applied to the *injury* complained of, and are understood to devolve upon the Secretary of the Treasury the power of deciding whether such injury be "just and equitable;" whilst, in the other, they are applied to the *decision* of the judge, and are understood to be merely directory to the Secretary of the Treasury. The former has no reference to the treaty, and considers the words "just and equitable" as having no connexion with the question whether the claim comes within the provisions of the treaty. The latter regards the due execution of the treaty as the great object of the statute, and the paramount consideration in its construction. It proceeds upon the idea that all the parts of the statute were designed to be *consonant* to each other, and that one and the same spirit reigned throughout the statute; and in applying the words "just and equitable" to the decision of the judge, instead of the original injury, it conforms not only to the spirit and intention, but to the very letter of the statute; for no one disputes that the literal meaning of the language refers the words "just and equitable" to the decision of the judge, and the spirit and intention of the statute are too plain to admit of question. In a word, the former subverts, whilst the latter subserves, the treaty.

The difference between these two applications of the words "just and equitable" is sufficiently obvious. The treaty provides that satisfaction shall be made for the injuries which shall be judicially established. Upon the judicial establishment of the injury, therefore, satisfaction is due. In the nature of things, as well as in law, the judgment is the only evidence which can be adduced of the judicial establishment of the injury; in other words, it is the only competent evidence of itself. The first section of the act of 1823 provides a tribunal, and invests it with the power of judicially establishing the injuries. A judgment of that tribunal in a proper case, therefore,

establishes the injury, and such a judgment is "just and equitable,' within the provisions of the treaty, for it is, in justice and equity, precisely such a judgment as the treaty contemplates, and such a judgment as is entitled to satisfaction. In determining, then, whether the *decision* of the judge is "just and equitable, within the provisions of the treaty," the simple inquiry is, was it made by the proper judge in a proper case? But whether the *injury* complained of is "just and equitable" is altogether a different question. Still, the terms themselves are, in both instances, used in the same sense. In what sense they are *definite* I have heretofore considered.

It would be easy to show, too, that the words "just and equitable" are as superfluous under the one construction as under the other. But this, it seems to me, is a circumstance of but little importance. Words of this kind are often used where, if they were stricken out, the sense would not be materially affected by it. We often find in the most solemn instruments, drawn with a studious reference to precision and accuracy, words which are mere expletives, or used to give emphasis to other words. The seventh section of the first article of the Constitution of the United States is as follows: "But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of *each* house, *respectively*." The word "respectively" might be obliterated without changing the meaning of the section; and yet can it be said that no meaning is attached to it? The tenth section of the same article reads: "No State shall * * unless *actually* invaded." It would be difficult to conceive of an invasion which was not *actual*, or of a State *invaded*, which was not *actually* invaded; but would it ever occur to any lawyer that, in the construction of this section, no meaning is to be given to the word "actually?" Other instances, without number, might be given, but these are sufficient for my present purpose. I have purposely taken them from the Constitution of the United States, because that instrument is of the gravest character, and was framed by men of distinguished learning and ability, with a cautious reference to accuracy and precision of language.

To sustain the construction which gives to the words "just and equitable" the effect of conferring on the Secretary of the Treasury the power to revise the decision of the judge, it is necessary to insert the word "and," so that the statute may read "just and equitable, *and* within the provisions of the treaty." But it is the duty of all courts to confine themselves to the words of the legislature; *nothing adding thereto, nothing diminishing*.—(Per Tindal, C. J., in Everett *vs.* Mills, 4 Scott, N. C., 531.) The general rule certainly is, that words cannot be inserted; and the only exception to it, of which I am aware, is, that to effectuate the intention, words obviously intended to be inserted may be considered as inserted, where it is but *expressio eorum quæ tacitè insunt*. But the insertion of the word "and" in this case, so far from being obviously intended, would defeat the expressed object and intent of the statute. It seems to me, therefore, that the construction which renders the question whether the decision of the judge is "just and equitable" distinct from the question whether it is

"within the provisions of the treaty," so as to require the Secretary of the Treasury to consider (1) whether the claim is "just and equitable" without reference to the treaty, and (2) whether it is "within the provisions of the treaty," cannot be sustained. In this respect the statute presents but a single point for the consideration of the Secretary of the Treasury: whether the decision of the judge is "just and equitable," within the provisions of the treaty?" And this is the same thing as the question, is the decision of the judge "just and equitable," considered with reference to the treaty—"just and equitable" in the sense of the treaty?

In the enactment of the statute of 1823 there was no question in the minds of Congress as to the relative capacity or fitness of the judges of Florida and the Secretary of the Treasury to perform the duties to be created by it, or as to the relative trust-worthiness of those officers. The matter which then addressed itself to the consideration of Congress was, how best to carry the treaty into effect—not whether this or that duty was the more easy or the more difficult. They are not to be presumed to have conferred a judicial duty on the Secretary of the Treasury, for the plain and obvious reason that they could not have done so consistently with either the treaty or the Constitution of the United States. And here was abundant reason why the power of revising the decision of the judge might not as properly have been given to the Secretary of the Treasury as the power of determining whether a case reported to him was properly authenticated for payment. And, moreover, both these questions are equally questions of law. In a given case, the facts being proved, there is no longer any question of fact; and if anything remains to be decided, it must, of necessity, be a question of law.

Under the act of 1823 the Secretary of the Treasury has no power to revise and re-examine the decision of the judge on any point. His authority is simply to pay money, and he is merely vested with a discretion in determining when a proper case for the exercise of that authority is presented to him. He is to pay, on being *satisfied*, &c. The validity of the judge's decision is not made to depend on the action of the Secretary of the Treasury. The decision may be valid, whether he is *satisfied*, &c., or not. He can decide nothing conclusively. He is a merely executive officer, and judicial duties cannot be conferred upon him. A discretion being given him by the act, his duty under it is, therefore, *executive*, and not *ministerial;* but it is a mere discretion, and not the power, judicially to decide. It is, that *he* may be *satisfied*, not that the right may be *settled*. The legal effect is, that, however erroneously he may act, if his discretion is honestly exercised, he will be excused from personal responsibility; and this is the whole legal effect of his rejecting a claim or any part of it. The judgment still stands in full vigor, and the obligation to satisfy it remains unimpaired and undischarged. His powers are analogous to those of a sheriff under an execution. The latter must determine for himself, whether the execution was issued upon a judgment rendered by a court of competent jurisdiction. If it was, then he can justify his action under it; but if it was not, and he acts under it, he is a trespasser. The only difference is, that the sheriff acts at

his peril, whilst the Secretary of the Treasury is vested with a discretion, and is bound only to an honest exercise of it. But the validity of the judgment in either case is in no way affected by the action of the officer called on to execute it. An erroneous rejection of a judge's decision by the Secretary of the Treasury, therefore, does not change its character, or relieve the United States from the obligation to satisfy it. It remains against them a debt under the treaty—an injury *established by process of law*—notwithstanding its rejection by the paying officer. He is excused, because he acted honestly; but nevertheless *satisfaction* still remains to be made.

Under the act of 1834 the Secretary of the Treasury has no power to decide whether a claim is "just." The power given him under the first section of that act is merely to pay the amount awarded by the judge in all cases where the decision of the judge is deemed by the Secretary of the Treasury "to be just." There is, I believe, no difference of opinion between me and my brother judges, that the acts of 1823 and 1834 are *in pari materia*, and to be construed together as constituting one system. We concur, I believe, in the opinion that the injuries of 1812 and 1813 are within the treaty, and that the word "just" in the act of 1834 is to receive the same interpretation as the words "just and equitable" in the act of 1823. But this is a matter of but little importance, as this case was presented under the *second* section of the act of 1834, and the only provision for its satisfaction is made by the second section of the act of 1823. The construction of the word "just" in the first section of the act of 1834 is immaterial here.

In my former opinion I endeavored to show why the whole evidence was to be reported, and on that I now content myself with referring to what I then said.

It is impossible so to construe the second section of the act of 1823 as to refer the words "the amount thereof" to the decision of the judge, *as modified by the action of the Secretary of the Treasury*, without inserting therein the words "as modified by the action of the Secretary of the Treasury." We have already seen that words can only be considered as inserted when they are *necessarily* implied—when they were *obviously* intended to be inserted. In any other case, the introduction of qualifying words in the interpretation of a statute would, in the language of Lord Denman, (in Lamond *vs.* Eiffe, 3 Queens B. R., 910,) be "a great reproach to the law." Now, when it is considered that, without the insertion of these words, the words "just and equitable" could not be so interpreted as to confer upon the Secretary of the Treasury the power to revise the decision of the judge; that such an intrepretation of them renders the act of 1823 violative of the very treaty which it professes to carry into effect; and that their insertion will, therefore, defeat the expressed object of the act, I submit that it cannot be either just or proper to insert them. I repeat here what I said in my former opinion: "A case which will justify such a liberty for such a purpose, I venture most respectfully to affirm, cannot be found in the annals of jurisprudence."

I have not seen it anywhere insisted that, because the terms "pro-

cess of law," in the English original, and the words "justifiquen legalmente," (translated—"judicially prove according to law") in the Spanish original, of the treaty, mean the judgment of a judicial court, or of a judicial magistrate; *any* mode of ascertaining the amount of the injuries which might be adopted *must* be judicial. The argument on this point is, that the words "process of law" mean the judgment of a judicial court, or of a judicial magistrate; that the act of 1823, which was professedly passed to carry the ninth article of the treaty into effect, confers upon the judges of the superior courts of Florida, respectively, the power of adjudging the claims arising within their respective jurisdictions, *agreeably* to the provisions of the ninth article of the treaty; that this power is, in its nature judicial, and conferred on judicial officers by their judicial titles and in their official characters to be exercised judicially; that the language used is appropriate to this purpose; and that, therefore, the tribunal invested with this power is a judicial tribunal, and its decisions judicial judgments, by which the claims adjudged by it were either judicially established or judicially rejected. This argument, it seems to me, is sound and correct, in both its premises and conclusions.

I adhere to my former opinion.

ROBERT HARRISON v. THE UNITED STATES.

Judge BLACKFORD'S opinion.

This case was, on the 15th of August, 1856, referred by the Senate of the United States to this court by a resolution as follows:

"*Resolved*, That the memorial of Robert Harrison, together with the papers on the filess of the Senate relative thereto, be referred to the Court of Claims."

In examining this case, we are to ascertain whether the claimant has a legal cause of action, and if we find that he has not, the claim will be at an end in this court.

In the 9th article of the treaty of 1819 with Spain, there is the following clause:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida." 8 Stat. at Large, 260.

In 1823, an act of Congress was passed directing certain judges in Florida, respectively, to receive and adjust all claims arising within their respective jurisdictions, of the inhabitants or their representatives, agreeably to the provisions of the 9th article of the treaty with Spain. The judges were also directed to report such of their decisions as were favorable to the claimants, *with the evidence*, to the Secretary of the Treasury, who, on being satisfied that the same were just and equitable, within the provisions of said treaty, should pay the amount thereof. 3 St. at Large, 768.

In 1834, Congress passed another act, which, in the first section, diirects the Secretary of the Treasury to pay the amount awarded by the judge of the superior court at St. Augustine, under said act of 1823, for losses occasioned in East Florida by the troops in the United States service, in 1812 and 1813, in all cases where the decision of said judge should be deemed, by said Secretary, to be just: "Provided, that no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government; and provided, also, that no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States."

By the second section of this act the said judge was authorized to receive, examine, and adjudge, all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not therefore presented to the said judge, or in which the evidence was withheld in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for the treaty of February 22, 1819, between the governments of the United States and Spain. "Provided, that such claims be presented to the said judge in the space of one year from the passage of this act; and provided also, that the authority herein given shall be subject to the restrictions created by the provisoes to the preceeding section." 6 St. at Large, 569.

The claim now before us is for a certain amount of interest allowed to the claimant, under said acts of Congress, by Judge Reid, in East Florida; but to which interest two Secretaries of the Treasury, in the discharge of their respective duties under said acts, have held the claimant not to be entitled.

A transcript of the record of the decision of said judge has been forwarded to us from the Treasury Department.

This transcript shows that the petition of the present claimant, sworn to on the 3d of December, 1834, was presented to said judge, under said acts of Congress, and that the judge examined the evidence, and rendered a decree in favor of the petitioner for the sum of "nine thousand two hundred and fourteen dollars, for the losses sustained by him in the years 1812 and 1813, with interest at five per cent. from the tenth day of May, 1813."

The said transcript sets out the evidence in the case, and is signed as follows: "Robt Raymond Reid, Judge Supr. Court, Dist. E. Flor'a., and Com'r."

The following is the certificate annexed to the transcript:

"TERRITORY OF FLORIDA—*District of East Florida*:

"I hereby certify that the foregoing pages from one to twenty-eight (from 1 to 28) contain a correct copy of the claim of Robert Harrison, for losses in 1812 and 1813, and of the evidence and decree therein, now of file in my office.

"Dated this 3d Sept., 1837.

"ROB'T RAYMOND REID,
"*Judge Supr. Court, Dist. E. Flor'a, and Com'r.*"

The Secretary of the Treasury, to whom the above mentioned transcript was certified under said acts of Congress, endorsed on the transcript his decision in the case as follows:

"In the within case of Robert Harrison, a claimant under the 9th article of the treaty with Spain of the 22d of February, 1819, the entire amount awarded by the judge of the superior court of East Florida, is not approved. But the sum of seven thousand five hundred dollars, without interest, being deemed a reasonable remuneration for the losses as proved by the evidence adduced, is accordingly allowed, in virtue of the power vested in me by the act of the 26th of June, 1834, entitled 'An act for the relief of certain inhabitants of East Florida.'

"Respectfully referred to the First Auditor for settlement.

"LEVI WOODBURY,
"*Secretary of the Treasury.*

"Treasury Department, October 25, 1837.'

The said sum of seven thousand five hundred dollars, allowed by Secretary Woodbury, was paid, as is stated in the petition.

About fifteen years afterwards, Mr. Corwin. then Secretary of the treasury, thought proper to open the former settlement, and to make an additional allowance in the case as follows:

"TREASURY DEPARTMENT,
"*September* 21, 1852.

"In the within case of Robert Harrison, a claimant under the 9th article of the treaty with Spain of the 22d Feb., 1819, for losses in E. Florida, in the years 1812, 1813, it appearing that an award amounting to the sum of nine thousand two hundred and fourteen dollars, was made by Judge Reid, at St. Augustine, on the 3d Sept., 1837, on which award the sum of seven thousand five hundred dollars, was approved and paid under the decree of this Department, dated the 25th Oct., 1837, as per statement No. 73,350, filed in the office of the register; and it further appearing to the satisfaction of the Department, on a careful examination of the case, that the further sum of one thousand seven hundred and fourteen dollars is justly due the said claimant, the said sum of one thousand seven hundred and fourteen dollars included in said award, is allowed, without interest, as the balance in full of the entire claim, to be paid to the said Robert Harrison, or his legal representatives.

"Done in virtue of the power vested in me by the act passed the 26th June, 1834, 'For the relief of certain inhabitants of E. Florida.'

"Referred to the First Auditor for settlement.

"THO. CORWIN,
"*Secretary of the Treasury.*"

The said sum of one thousand seven hundred and fourteen dollars is admitted by the petition to be paid.

It thus appears that the whole of the principal sum of nine thousand two hundred and fourteen dollars, allowed by Judge Reid to the claimant, has been paid at the Treasury; and that the allowance of interest has been rejected.

It is for the amount of that *interest* that the present suit is brought.

I have thus given a full statement of the facts and the law of this case, from which statement it appears that the case is substantially the same with that of Humphreys *vs.* The United States, very recently decided by this court. That case was very ably argued by counsel, and was decided, by a majority of the court, against the claimant.—The court is of the same opinion now, on the questions involved in these cases, that we were when the former one was decided; and the opinion of the court therefore is, that the present claimant has no legal cause of action. The reasons for this opinion will be found in the opinions of the judges delivered against the claim in the said case of Humphrey *vs.* The United States. It is unnecessary to repeat those reasons here. There is one authority, however, cited in that case to which I will refer. It is a decision of the Supreme Court of the United States respecting a claim similar to the one now before us. The court there says: "Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable.

No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress." The United States *vs.* Ferreira, 13 Howard, 40, 47. That is a case in point against the present claim.

In the above cited case of Humphreys *vs.* The United States, I expressed no opinion whether the Secretary of the Treasury, in rejecting the claim for interest allowed by Judge Reid, had or had not decided correctly. So, in the present case, I express no opinion whether the claimant was or was not entitled to the interest, or any part of it, allowed by Judge Reid and disallowed by the Secretary of the Treasury. That is a question over which this court has no jurisdiction; and that is my reason for expressing no opinion respecting it.

LETITIA HUMPHREYS, ADMINISTRATRIX,

vs.

THE UNITED STATES.

Opinion of the court delivered by BLACKFORD, J.

This is a claim by the administratrix *de bonis non* of Andrew Atkinson, deceased, against the United States. The claim is for interest on certain damages which, it is alleged, the intestate sustained, in 1812 and 1813, by the operations of the American army in Florida.

To understand the nature of the claim, it will be necessary to refer to the treaty of 1819, between the United States and Spain, for the cession of the Floridas, and to certain acts of Congress of 1823 and 1834.

The ninth article of said treaty contains the following clause:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

In consequence of that clause in said treaty, Congress, on the 3d of March, 1823, passed the following act:

"*Be it enacted, &c.*, That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"SEC. 2. *And be it further enacted,* That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty *shall pay the* amount thereof to the person or persons in whose favor,

the same is adjudged, out of any money in the treasury not otherwise appropriated."—(3 Stat. at Large, p. 768.)

On the 26th of June, 1834, Congress passed another act, as follows:

"*Be it enacted, &c.*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the 161st chapter of the acts of the 17th Congress, approved 3d March, 1823, for losses occasioned in East Florida by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed, by the Secretary of the Treasury, to be just: *Provided*, That no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And provided, also*, That no award be paid for depredations committed in East Florida, previous to the entrance into that province of the agent or troops of the United States.

"SEC. 2. *And be it further enacted*, That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain: *Provided*, That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided. also*, That the authority herein given shall be subject to the restrictions created by the provisos to the preceding section."—(6 Stat. at Large, p. 569.)

After the passage of this act of 1834, and within the limited time, the administratrix of said Atkinson, deceased, presented her claim, under said acts of Congress, to the judge of the superior court at St. Augustine. The judge accordingly examined the testimony in the case, and in August, 1839, rendered a decree in favor of the claimant for $3,800, with interest at the rate of five per cent. per annum from the 10th of May, 1813. The judge soon afterwards certified the proceedings, with the evidence in the case, to the Secretary of the Treasury of the United States, as the said acts of Congress required. The then Secretary, Mr. Woodbury, made the following decision in the case:

"In the within claim of Susan Murphy, administratrix of Andrew Atkinson, deceased, a claim under the ninth article of the treaty with Spain of the 22d of February, 1819, the sum of 2,300 dollars, being as much of the award of the judge of the superior court of East Florida as is deemed just and proper, is *approved*, without interest, in virtue of power vested in me by the act of the 26th of June, 1834, entitled 'An act for the relief of certain inhabitants of East Florida.' The case is therefore referred to the First Auditor for settlement.

"LEVI WOODBURY,
"*Secretary of the Treasury.*

"TREASURY DEPARTMENT,
"*November* 28, 1839."

That amount of $2,300 was accordingly paid.

Afterwards, in September, 1852, the then Secretary of the Treasury, Mr. Corwin, made the following further decision in the case:

"TREASURY DEPARTMENT, *September* 21, 1852.

"In the within case of the estate of Andrew Atkinson, deceased, a claimant under the 9th article of the treaty with Spain of the 22d February, 1819, for losses in East Florida in the years 1812–'13, it appearing that an award, amounting to the sum of $3,800, was made by Judge Reid, at St. Augustine, on the 15th August, 1839, on which the sum of $2,300 was approved and paid under the decree of this department, dated 28th November, 1839, as per statement filed in the office of the Register, No. 78,295; and it further appearing to the satisfaction of the department, on a careful examination of the case, that the further sum of $1,500, included in said award, is justly due the said claimant, the said sum of $1,500 is allowed, without interest, as the balance in full of the entire claim, to be paid to the legal representatives of said Andrew Atkinson. Done in virtue of the power vested in me by the act passed the 26th June, 1834, for the relief of certain inhabitants of East Florida. Referred to the First Auditor for settlement.

"THO. CORWIN."

That sum of $1,500 was accordingly paid.

Therefore, the award of the judge, so far as regards the principal sum, has been approved, and the money paid; but so far as regards the interest, the award has been disallowed.

The administratrix *de bonis non* of said Atkinson now files her petition in this court in order to recover the interest, which the Secretary refused to pay, with damages for its non-payment.

This case, according to our view of it, depends upon two questions: First, whether the decision of the judge in Florida, in favor of the claim for interest, was subject to the review of the Secretary? and if it was, then, secondly, whether the judgment of the Secretary against the claim is final and conclusive as regards this court?

The clause in the Florida treaty, before referred to, provides that satisfaction be made for certain injuries, which should be established by process of law, to have been suffered by the then late operations of the American army in Florida; but it does not provide a tribunal by which the claims, on account of those injuries, should be decided. The appointment of such a tribunal was left by the treaty to be made by the government of the United States; and it was in consequence of the treaty, in that respect, that the act of 1823 was passed. There had been injuries committed in 1812 and 1813, and also in 1818, by the American army in Florida; and the Secretary of the Treasury had decided that the treaty did not apply to the injuries of 1812 and 1813. It was in consequence of that decision that the act of 1834 was passed, which provides for the injuries committed in 1812 and 1813. The acts of 1823 and 1834 must be considered as if their provisions were contained in the same act. The object of both acts is the same, namely, to furnish an appropriate remedy by which the injuries mentioned in the last clause of the ninth article of the treaty afore-

said might be established, and the satisfaction there alluded to be obtained.

It has been correctly said that the tribunal created by the act of 1823, and recognized by the act of 1834, consists of two parts: the judge in Florida constituting one, and the Secretary of the Treasury the other. The judge in Florida was to take the testimony, and determine upon the merits of the claims; and when he had decided in favor of a claim, he was required to report his proceedings, with the evidence, to the Secretary of the Treasury. And the Secretary, on being satisfied that the decision was just and equitable, within the provisions of the treaty, was to pay the amount.

It appears to us that the tribunal so constituted is in accordance with the requirements of the treaty. The treaty required the injuries to be established by process of law. That phrase, process of law, when used in a treaty, must, says an eminent lawyer, "be interpreted according to the law of nations, and not according to our municipal code." And no authority has been referred to showing that such phrase has any technical meaning by the law of nations. It was for Congress to provide a tribunal before which the claimants might have an opportunity to establish their respective claims. The tribunal in question is such a one. It is, to be sure, not an ordinary court of justice, nor does the treaty require it to be so. It is a tribunal, however, where every claimant can have the merits of his claim fairly adjusted and decided, upon such evidence as he himself may think proper to furnish.

The Florida judges were, by the law, to act as commissioners. That is shown by the acts of 1823 and 1834, from which the judges derive their authority. The act of 1823 says, "that the judges of the superior courts, &c., are hereby authorized," &c. And the act of 8134 authorizes the Secretary to pay "the amount awarded by the judge of the superior court," &c. It says, also, "that the judge of the superior court, &c., is hereby authorized," &c. So that the authority to adjust these claims is not given to the courts in Florida, but to the *judges*, respectively. It is not judicial power, properly speaking, but that of a commissioner only, that is conferred. The claimant relies on the case of the United States *vs.* Todd, decided by the Supreme Court of the United States in 1794, to show that the judges in Florida could not act as commissioners. But that case does not touch the question. The act of 1792, under which it was held that the judges of the circuit courts could not act as commissioners, did not confer, nor profess to confer, on the judges the power to act in the premises. It was only to the circuit courts that the authority was given. Had the act of 1792, like the acts of 1823 and 1834, given the power to the judges instead of to the courts, there is nothing in the case of the United States *vs.* Todd which shows that the judges could not have acted as commissioners.—(See the case of the United States *vs.* Todd, 13 Howard, 52, note.) We have on this subject a late decision of the Supreme Court of the United States in a case arising under the same clause in the Florida treaty, and the same acts of Congress, with the case now before us. The language of the Chief Justice, in delivering the opinion of the court, is as follows:

"The law of 1823, therefore, and not the stipulations of the treaty,

furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptation of the term are to be made; no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable; but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

"It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award."—(The United States *vs.* Ferreira, 13 Howard, 46, 47.)

That opinion of the Supreme Court is in point to show, that the judge in those cases acts merely as a commissioner and not as a court. The proceedings of the judge in the case now before us do not purport to be the proceedings of a court. The judge calls his decision an "award," and signs it as follows: "Robt. Raymond Reid, Judge and Com'r."

The copy of the proceedings sent by the judge to the Secretary of the Treasury has annexed to it the following certificate:

"TERRITORY OF FLORIDA, *District of East Florida.*

"I hereby certify that the foregoing pages, from one (1) to seventy-four (74) inclusive, contain a true copy of the claim of Mrs. Susan Murphy, the administratrix of Andrew Atkinson, deceased, the evidence taken therein, and the award thereon—the originals of which are now of file in my office. Dated at St. Augustine, 15th August, 1839.

"ROBT. RAYMOND REID,
"*Judge and Com'r.*"

The act of 1847, relative to this business of the judge, calls him a commissioner.—(9 Stat. at Large, p. 130.) The Supreme Court decides further in the above cited case, that the creation of the judges as commissioners was a compliance with the treaty.

nsidering the judge, therefore, with respect to these claims, as a

commissioner, and authorized to act as such in the premises, the case seems to be a very plain one. The judge examines and determines the case and reports his proceedings, with the evidence, to the Secretary of the Treasury, and the Secretary, if he find the decision of the judge to be just and equitable, within the provisions of the treaty, pays the claim, but not otherwise.

An objection has been made to considering the judge as a commissioner, on the ground that Congress had no authority to make such an appointment. But if that appointment is void, there is no foundation for the present claim. The law, as has been shown, gives no authority to the court in Florida to act in the premises. The report by the judge of his proceedings shows that he did not act as a court. He acted solely as a commissioner; and if he was not legally a commissioner, his proceedings are a nullity. And if his proceedings are a nullity, there is not only no ground for the present claim for interest, but the three thousand eight hundred dollars principal, formerly received for the estate of Atkinson from the treasury, can be recovered back by the United States as having been received upon a void report.

The claimant's counsel contend that the act of 1823, in saying that the Secretary of the Treasury, on being satisfied that the decision "is just and equitable within the provisions of the treaty, shall pay the amount thereof," has a very limited effect. They contend that the act only means that the Secretary shall determine whether the case is within the provisions of the treaty, that is, whether the injury was committed in Florida; whether the person injured was a Spanish officer, or an individual Spanish inhabitant, &c.; but that it does not mean that the Secretary shall determine whether or not the decision is just and equitable. We feel very confident that the meaning of the act is not so limited. The language, indeed, of the act is directly to the contrary. If the Secretary's authority is limited, as the counsel contend, why does the act require that all the evidence taken shall be reported to the Secretary, and that he shall be satisfied before he pays the money that the decision of the judge is just and equitable within the provisions of the treaty? If, as is admitted, the Secretary cannot pay the money awarded until he has ascertained, from the evidence, whether the case is within the provisions of the treaty, how is it possible for him to pay it until he has ascertained, by the same means, that the decision is just and equitable? The same section of the act of 1823—the same sentence, indeed—that requires the Secretary to make the former inquiry, requires him to make the latter also, before he pays the money.

The claims embraced by the acts of 1823 and 1824 were very large. Those that had been reported to the Secretary of the Treasury amounted, in 1854, to two millions eight hundred and eight thousand seven hundred and three dollars and fifteen cents; of which claims, the Secretary had paid one million two hundred and twenty-four thousand nine hundred and ninety-two dollars and sixty-eight cents. The interest on the claims amounted, in 1854, to one million five hundred and fifty thousand four hundred and thirteen dollars.—(See report of Secretary Guthrie, Senate Document No. 82, 33d Congress, 1st session.)

Congress may not have known when the act of 1823 or that of 1834

was passed that these claims would be so large; but it is fair to presume that they did know that the amount was entirely too large to be entrusted to the *final* decision of the two judges in Florida, each acting by himself on the cases before him. It was, therefore, to be expected that a review of their decisions would be provided for. That was accordingly done by making it the duty of the Secretary of the Treasury to revise the respective decisions of those judges, and not to pay any allowances of either of them which he did not find to be just and equitable.

That the provisions of the act of 1823, giving a revisory power to the Secretary as aforesaid, is perfectly consistent with the treaty, is expressly decided by the Supreme Court of the United States. The following is the language of the Chief Justice:

"Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him, and his decision against the claimant for the whole or a part of a claim, as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

"It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice, and that the right of supervision given to the Secretary, over the decision of the district judge, is, therefore, a violation of the treaty.

"The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions, and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly, the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law, by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal."—(The United States *vs.* Ferreira, before cited.)

It would seem that this opinion of the Supreme Court ought to settle the point that the tribunal in question, consisting of the judge

as a commissioner, and the Secretary having a revising power, is in accordance with the treaty.

But, after all, we cannot believe that it is important for this court to inquire whether the tribunal is or is not consistent with the treaty. We are bound to consider the tribunal to be properly constituted. The treaty stipulation that the United States would cause satisfaction to be made in certain cases was a contract to be executed by Congress. Chief Justice Marshall, on this subject, says: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."—(Foster *vs.* Neilson, 2 Peters, 314.) Congress has in this case, in the exercise of its exclusive jurisdiction, created a tribunal for the special purpose of determining these cases; and it is not for this or any other court to lessen or otherwise interfere with the powers of that tribunal. There was no tribunal subsequently to the treaty to which the claimant could resort until the act of 1823. There is none now but the one which that act has established. The authority of the judge, as we have before said, depends not upon the treaty, but upon the acts of Congress of 1823 and 1834, and upon those acts alone. The legislative provisions relative to the powers and duties of the judge and the Secretary of the Treasury, in these cases, cannot be separated. What kind of tribunal on the subject should be established, was a political question for Congress to determine. They have determined that the allowance made by the judge shall be subject, both as to his jurisdiction and as to the merits of the claim, to the revision of the Secretary; and no court can say that there shall be no such revision. The decision of the judge can have no effect, under the law, until the Secretary has decided upon the justice and equity of the claim. If, upon the evidence, the Secretary finds that the decision of the judge is not just and equitable, he is bound to reject it; and so, if he finds a part of the decision to be unjust and inequitable, he must reject that part.

We have now shown, we think, that whether the decision of the Florida judge in favor of the claim for interest was just and equitable, was a question for the determination of the Secretary of the Treasury. In arriving at this conclusion, it is a satisfaction to know that our opinion is based upon a decision of the Supreme Court of the United States. It is always gratifying to a court, in deciding a case, to have in favor of its decision a well considered opinion of another judicial tribunal. It is especially so when that tribunal is, in every respect, the highest in the land. The case of Ferreira *vs.* The United States, above referred to, was fully argued by eminent counsel, and the opinion of the court was delivered by its distinguished Chief Justice. The claimant contends that the reasoning of the court in Ferreira's case is not authority. The question whether the court had jurisdiction depended, as the court considered, upon whether the decision of

the judge in Florida was or was not the decision of a court; and whether it was subject to the revision of the Secretary of the Treasury. To determine those questions, an examination of the said treaty and acts of Congress was necessary. The court was of opinion that the judge acted as a commissioner and not as a court; and that the revisory power of the Secretary was unobjectionable. It was by virtue of that opinion that the court reached the conclusion that it had no jurisdiction of the case. The reasons given by the Supreme Court, to show that the judge acted merely as a commissioner, and that his decision was subject to the review of the Secretary, are, in our opinion, unanswerable.

The remaining question is, whether the decision of the Secretary of the Treasury, against the claim for interest, is not final and conclusive?

It appears to us to be very clear that the Secretary's decision against the claimant puts an end to the demand. This judgment is sustained by the opinion of the Supreme Court of the United States in Ferreira's case, before cited. The decision of the Secretary, as to the law and the facts, must be considered as the decision of a competent tribunal of exclusive jurisdiction. It stands upon the same ground with the decision of a board of commissioners appointed by or under a treaty to determine upon the amount and validity of such claims as the one before us. That the decision of such a board is conclusive, has been settled by the Supreme Court of the United States in the case of Comegys *vs.* Vasse, 1 Peters, 212. The same point is decided by this court in the case of Thomas *vs.* The United States, and Roberts *vs.* The United States.

Considering, as we do, the decision of the Secretary against the claim for interest as final, we have not found it necessary to extend our inquiry on the subject of interest beyond that decision.

It is the opinion of the court, for the foregoing reasons, and upon the authorities cited, that the claimant has shown no ground for relief.

IN THE COURT OF CLAIMS.

ROBERT HARRISON *vs.* THE UNITED STATES.

SCARBAUGH, J., dissented.

I dissent from the judgment of the court in this case. It is, in principle, the same as the case of Letitia Humphreys *vs.* The United States, and I refer to my opinions in that case for the reasons on which this opinion is founded.

LETITIA HUMPHREYS, ADMINISTRATRIX OF ANDREW ATKINSON, DECEASED,

vs.

THE UNITED STATES.

Dissenting opinion delivered by SCARBURGH, J.

If this were an ordinary case, I think it probable that I should submit in silence to the judgment of the majority of the court, even though I should entertain an opinion different from that of my brethren. But, in the view which I have taken of this case, it involves principles of the gravest magnitude and importance. It is said to be one of a class of cases in which the mere money demand extends to hundreds of thousands; but that consideration, though highly important, sinks, in my judgment, into utter insignificance, when compared with the great principles which they present for adjudication. I cannot concur in the opinion of the majority of the court. I feel constrained to dissent from it, and to declare the reasons on which my dissent is founded. I do so under a solemn conviction of duty.

The treaty of 1819, between the United States and his Catholic Majesty, was drawn up in the Spanish as well as in the English language. Both are originals.—(United States *vs.* Perchman, 7 Peters' R., 81.) In the English original the ninth article contains the following provision:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."—(8 Stat. at Large, p. 252.)

I have obtained two translations of the corresponding provision in the Spanish original: the one, through the solicitor of this court, and the other, through the counsel for the petitioner. They were made by different persons, but substantially—almost in *ipsissimis verbis*—agree. They are appended to this opinion. The following is the translation furnished by the solicitor:

"And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may (or shall) judicially prove, according to law, that they have suffered (literally to have suffered) by the operations of the American army in them (the Floridas)."

On the third day of March, A. D. 1823, Congress passed an act entitled "An act to carry into effect the ninth article of the treaty concluded between the United States and Spain the twenty-second day of February, one thousand eight hundred and nineteen." It is as follows:

"That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be,

and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"SEC. 2. That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated."—(3 Statutes at Large, p. 768.)

On the 25th day of June, A. D. 1834, Congress passed another act entitled "An act for the relief of certain inhabitants of East Florida." It is as follows:

"That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the one hundred and sixty-first chapter of the acts of the seventeenth Congress, approved third March, one thousand eight hundred and twenty-three, for losses occasioned in East Florida by the troops in the service of the United States, in the years one thousand eight hundred and twelve and one thousand eight hundred and thirteen, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just: *Provided,* That no award be paid, except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And provided also,* That no award be paid for depredations committed in East Florida previous to the entrance into that province of the agents or troops of the United States.

"SEC. 2. That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all claims for losses occasioned by the troops aforesaid, in one thousand eight hundred and twelve and one thousand eight hundred and thirteen, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February twenty-second, one thousand eight hundred and nineteen, between the governments of the United States and Spain: *Provided,* That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided also,* That the authority herein given shall be subject to the restrictions created by the provisoes to the preceding section."—(6 Stat. at Large, p. 569.)

After the passage of the act of 1834, Susan Murphy, administratrix of Andrew Atkinson, deceased, filed a petition before Robert Raymond Reid, judge of the superior court for the eastern district of Florida. In her petition she alleged, among other things, that in the years 1812 and 1813 her intestate was subjected to certain losses and damages, which she specifically sets forth, by the acts of the troops of

the United States and their confederates, in the then province of East Florida; that the losses occurred subsequently to the appearance of the troops and agents of the United States in East Florida; and that her intestate was at that time, and ever continued, a faithful Spanish subject, active and true in the discharge of his duties.

Due proceedings were had upon the petition, and a judgment was awarded by the judge, "that the claimant do recover the sum of three thousand eight hundred dollars for her intestate's losses in 1812 and 1813, with an interest of five *per centum* from the 10th May, 1813." This judgment, with the evidence on which it was founded, was, by the judge, reported to the Secretary of the Treasury. On the 28th day of November, A. D. 1839, the Secretary of the Treasury directed the payment of the sum of $2,300, part of the amount adjudged in favor of the claimant; and subsequently he directed the payment of the sum of $1,500, the residue of the principal sum awarded by the judgment in favor of the claimant. These two sums of money have been paid; but the Secretary of the Treasury refused to pay the interest, which the claimant recovered by the judgment, and the same remains unpaid. The petitioner now claims the interest.

Prior to the passage of the act of 1834, the Secretary of the Treasury held that injuries suffered in 1812 and 1813 were not within the treaty, and this decision, it seems, occasioned that act.

I. In determining whether the petitioner is entitled to relief, I deem it important to inquire, in the first place, whether her case is embraced by the provisions of the ninth article of the treaty.

The only doubt which has ever been suggested upon this point has arisen from the word "late," which is found in the English, but not in the Spanish, original of the treaty. If it be interpreted in the sense of "latest," or "last," then the English and Spanish parts are wholly irreconcilable. At the date of the treaty Florida was divided into two provinces—East and West Florida. The last operations of the troops of the United States occurred in the year 1818, and were confined to West Florida. The words of the Spanish original cannot, therefore, be satisfied, if they be restricted to the operations in 1818, because, in their natural import, they extend to both the Floridas, and they cannot, without violence, be limited to one of them only. And, moreover, the Spanish original does not contain the word "late." But the word late does not necessarily mean "latest," or "last." It may mean "not long past; happening not long ago; recent." It is apparent, therefore, that no violence will be done to the word "late" by extending it so as to include the operations of the troops of the United States in East Florida in 1812 and 1813. At the time of making the treaty there would have been no impropriety of language in saying that they occurred not long ago—recently. If this construction be adopted, the English and the Spanish originals harmonize with each other. "Both are originals, and were, unquestionably, intended by the parties to be identical. * * * If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail."—(Per Marshall, C. J., in United States *vs.* Perchman, 7 Peters' R., 88.)

The Supreme Court acted upon this principle in that case. Although, looking alone to the original in the English language, they had held, in the case of Foster *vs.* Neilson, (2 Peters' R., 253,) that the words "shall be ratified and confirmed," in the 8th article of the treaty of 1819, were words of contract, stipulating for some future legislative act; yet the Spanish part of the treaty being brought to their view in the case of The United States *vs.* Perchman, and the words, translated, being "shall remain ratified and confirmed," they overruled their former decision, and held the meaning to be "ratified and confirmed" by force of the instrument itself, without the aid of legislation. The analogy between that case and this is clear. If there be any difference between them on this point, less effort is required in this than in that to produce a conformity between the Spanish and English parts. It may certainly be as truly and as properly said here as there, that "no violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other."—(Ibid., 89.)

This construction of the treaty is fortified by the act of 1834, which overrules the action of the Secretary of the Treasury, by which the cases of 1812 and 1813 had been rejected, and in effect declares that they are within the provisions of the treaty. Such is clearly the proper construction of that act. The first section of it provides for the satisfaction of the judgments which had already been rendered in those cases; and the second authorizes the judge of the superior court at St. Augustine to receive, examine, and adjudge all claims for losses in the years 1812 and 1813 which might, within one year from the passage of that act, be presented to him. There is no provision in that act for the payment of the judgments authorized by its second section. Unless they can be paid under the act of 1823, there is no authority given by law anywhere for their payment. I regard the two acts as constituting parts of the same system, and to be interpreted precisely as if they had been enacted at the same time. The judgments, then, under the act of 1834, were, like judgments under the act of 1823, to be reported to the Secretary of the Treasury, and paid by him, upon his being satisfied that they were just and equitable, within the provisions of the treaty. But it is clear that such could not have been the case if Congress had not intended by the act of 1834 to declare, in effect, that the losses of 1812 and 1813 were injuries under the ninth article of the treaty; for, if Congress had not so intended, the second section of that act would have been not only inconsistent with itself, but wholly nugatory.

There can be no doubt, then, I think, that the petitioner's case was embraced by the ninth article of the treaty.

II. I propose now to inquire whether the treaty stipulated for a judicial tribunal, before which the claims therein comtemplated should be established.

The words of the English original, which relate to this point, are, "which, by process of law, shall be established." The phrase "process of law" is a technical one in our jurisprudence, and its meaning is accurately defined and well understood. It had its origin in England, at least as far back as the days of Lord Coke, and no

doubt, so far as I am advised, has ever been expressed by any judicial tribunal as to its interpretation. In the famous *Magna Charta* of England it was provided that no freeman should be taken or imprisoned, or disseized of his freehold, &c., but by the law of the land, or the judgment of his peers. The words "by the law of the land" mean, we are informed by Lord Coke, "by due course and process of law," which he explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law."—(2 Inst., 45, 50.) The terms, then, "by the law of the land" and "by due process of law," are, in English jurisprudence, of precisely the same import, and it is from this source that we have derived them. They have been regarded as of so much importance that, either in the one or the other form, they have been inserted in the Constitution of the United States, and in the constitution of almost every State in the Union. They are there designed to be, as they are in *Magna Charta*, a restriction upon legislative authority. The words "by the law of the land" do not, therefore, mean merely an act of the legislature, for that construction would render the restriction absolutely nugatory. Their meaning, indubitably, is, that no citizen shall be disfranchised, or deprived of any of the rights of person or property, without a regular trial, according to the course and usage of the common law.—(Taylor *vs.* Porter, 4 Hill R., N. Y., 146; Hoke *vs.* Henderson, 4 Dev. N. C. R., 15.) "The better and larger definition of *due process of law* is," says Chancellor Kent, "that it means law in its regular course of administration through courts of justice."—(1 Kent's Com. 8th ed., 613–'14.) "*Due process of law*," says Judge Tucker, "must then be had before a judicial court, or a judicial magistrate."—(1 Tucker's Blk., part I, app., 203.)

The ordinary or common meaning of the words "process of law," is their technical meaning. In other words, they have no common or ordinary meaning, as contradistinguished from their technical meaning. They were, as we have seen, used by Lord Coke to explain the words "law of the land," as if they were already well known and fully understood. The term *process*, at the common law, in civil cases, is defined to be the means of compelling a defendant to appear in court.—(3 Blk. Com., 279.) *Processus, a procedendo ab initio usque ad finem*, is so called because it proceeds or goes out upon former matter, either original or judicial, and has two significations: First, it is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end. Secondly, that is termed the *process*, by which a man is called into any temporal court, because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding, after the original, before judgment.—(Britton, 138; Lamb., lib. 4; Crompt., 133; 8 Rep., 157; 5 Jacob's Law Dic., 302, 303.) It is, in the larger sense, that the words "process of law" are, in civil matters, equivalent to the words "the law of the land;" and hence it is that when a common-law lawyer speaks of establishing a thing by "process of law," he is understood to refer to a judicial

proceeding—a proceeding before a judicial court, or a judicial magistrate.

Such being the meaning of the words "process of law" in our jurisprudence, I can conceive of no good reason why they should be understood in a different sense in the 9th article of the treaty of 1819. If the object in using them was to give an assurance to his Catholic Majesty that his subjects should be allowed to establish their claims before a judicial court, or a judicial magistrate, it must be conceded that no more appropriate language could have been used for that purpose. The promise was made by the United States—it proceeded from them—and there was a propriety in expressing it in their language. The tribunal contemplated was their tribunal; the proceeding, such as is customary with the citizens of the United States. Hence, we would naturally expect that the stipulation should be made in language appropriately descriptive of such a tribunal and such a proceeding in the United States, and having a clear and well-defined meaning. None more expressive or better understood could have been selected. And, moreover, there was a peculiar appropriateness in the words used, for the further reason, that, by reference to the Constitution of the United States, and the well-established meaning of the words "process of law" as there used, the most satisfactory assurance could be given to the Spanish minister of their true meaning, when proceeding from us.

Hence, it seems to me that the conclusion is inevitable, that the words "process of law," in the 9th article of the treaty, mean a judicial court, or a judicial magistrate; and that the stipulation which it contains is, in effect, that means shall be provided by the United States to enable the Spanish officers and individual Spanish inhabitants to establish the injuries which they had suffered before such a court or magistrate. Such would be my conclusion if the 9th article constituted the entire treaty. But when I turn to the 11th article, and there find a special commission expressly provided for the settlement of claims due to citizens of the United States, my convictions are strengthened, and all doubt is removed. If it had been the intention of the high contracting parties to provide for the appointment of a board of commissioners under the 9th article, it is difficult to conceive why they did not use language clearly expressive of that intention, as they did in the 11th article. The truth is, that there was a difference of intention, and hence the difference in the language which was used. Under the 9th article, where Spanish subjects were concerned, a stipulation was required that their claims should be established before a judicial court, or a judicial magistrate; whilst under the 11th article, where citizens of the United States alone were concerned, a special commission was provided for. "The several inditing and penning of the different branches doth argue that the maker did intend a difference of the purview and remedies."—(Edrick's case, 5 Rep., 119.)

These views seem to me to be conclusive upon this point; but if any doubt could remain in regard to it, it must be entirely removed by the corresponding provision in the Spanish original. The language *there used* is, "judicially prove according to law." In a note to the

translation, kindly furnished me by the solicitor, the translator says: "The translation might be varied and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente.*" Language cannot be plainer than this. To undertake to explain it further would be a vain and useless task. It leaves not a loop to hang a doubt on as to its meaning. It fully sustains the construction which I have put upon the words "process of law."

III. The next point to be considered is, whether the United States, in stipulating that they would cause satisfaction to be made for the injuries embraced by the 9th article of the treaty, undertook to pay the sufferers, not only the actual value of the property which they lost, but interest on such value, by way of damages for the loss of the use of the property from the time the injury was committed.

It is believed that it has been the uniform practice of the government of the United States to demand, and not only to demand, but to receive, from foreign nations, interest in all such cases. If this be true, there can be no doubt as to the meaning of the 9th article of the treaty in this respect; for the idea is not to be tolerated for a moment, that they would demand as an act of justice an indemnity for their citizens which they would not, under similar circumstances, grant to a foreign nation for its citizens or subjects. The law of nations does not mean one thing when they are demanding a reparation for an injury, and just the opposite thing when a similar demand is made against them. They regard it as the same in both cases. If interest would be due *to* them in a given case, it would, if the case were reversed, be due *from* them. They have always demanded interest, because they believed that, according to the law of nations, it was due to them. They desire to observe good faith and justice towards all nations. They ask for nothing that is not clearly right, and submit to nothing which is wrong.

A case, which involved the question of interest, arose under the treaty of 1794 between the United States and Great Britain. In the seventh article of that treaty, the British government stipulated that compensation should be made to citizens of the United States for "losses and damages by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from his Majesty." In the same article provision was made for the appointment of five commissioners "for the purpose of ascertaining the amount of any such losses and damages."—(8 Stat. at L., p. 121.) This commission, it is believed, allowed *interest* as a part of the damages in all instances.—(See 2 Amer. State Papers, Foreign Relations, pp. 119, 120, 387, 388.) Dr. Nicholl, in the case of the "Betsy," stated the rule of compensation as follows: "To reimburse the claimants the original cost of their property and all the expenses they have actually incurred, together with *interest on the whole amount*, would, I think, be just and equitable compensation. This, I believe, is the measure of compensation usually made by all belligerent nations, and accepted by all neutral nations, for losses,

costs, and damages occasioned by illegal captures."—(Wheaton's Life of Pinkney, pp. 198, 265, note, and 371.)

By the 21st article of the treaty of 1795 between the United States and Spain it was agreed that "all differences on account of the losses sustained by the citizens of the United States, in consequence of their vessels and cargoes having been taken by the subjects of his Catholic Majesty, during the late war between Spain and France," should "be referred to the final decision of commissioners to be appointed" as therein provided for. The commissioners were to "be sworn impartially to examine and decide the claims in question, according to the merits of the several cases, and to justice, equity, and the law of nations." They awarded interest on the value of the vessels and cargoes.—(2 Amer. State Papers, Foreign Relations, p. 283.)

A difference arose between the United States and Great Britain in regard to the construction of the first article of the treaty of Ghent, and by the fifth article of the convention of 1818 they agreed to refer it to some friendly sovereign or State, to be named for that purpose.—(8 Stat. at L., 249–50.) The emperor of Russia was named by both governments, and accepted the umpirage.—(4 Amer. State Papers, Foreign Relations, 645.) He awarded that the United States were "entitled to claim from Great Britain a *just indemnification* for all private property which the British forces may have carried away.—(8 Stat. at L., 282.) A special commission was then instituted for the purpose of ascertaining and determining the amount of indemnification which might be due to citizens of the United States under the decision of his Imperial Majesty.—(8 Stat. at L., 284.)

The commissioners disagreed as to the proper measure of damages, and, in consequence of that disagreement, the commission was broken up. Mr. Cheves, the commissioner on the part of the United States, insisted upon the allowance of interest. He said: "The claim is not of interest *eo nomine;* it is adopted as a mitigated rule of damages, compensation, or indemnification, founded on the estimated pecuniary value of the article withheld. In that case the common law and the civil law are both clear in allowing reparation of the loss of the use of the thing withheld from the commencement of the tortuous detention. The rule of the public law is the same." * * "Indemnification means a reimbursement of a loss sustained. If the property taken away on the 17th February, 1815, were returned now, uninjured, it would not reimburse the loss sustained by the taking away and consequent detention; it would not be an indemnification. The claimant would still be unindemnified for the loss of *the use* of his property for ten years, which, considered as money, is nearly equivalent to the original value of the principal thing; so, in substituting a pecuniary value for the thing, unless interest is allowed for the use of the money, the claimant will remain unindemnified."

The subject was submitted by the Secretary of State to Mr. Wirt, the Attorney General, and his opinion sustains the views of Mr. Cheves in all respects. He said: "And then the only remaining inquiry is, what is the award? It is, that the United States are entitled to a *just indemnification* for the slaves and other property carried away by the British forces, in violation of the first article of the

treaty of Ghent. What is a *just indemnification* for a wrong? Is it the reparation of the one-half or two-thirds of that wrong? Is it anything less than a reparation of the whole wrong? On these few simple ideas the whole question turns. If an injury is *justly redressed* which is only *half redressed*, then the British commissioner is right; but if an injury is only redressed when the redress is commensurate with the whole extent of the injury, then he is wrong. Let us put aside the emphatic and striking word *just*, and take the word *indemnification* alone. What does the word indemnification mean? The *saving harmless from danger*. Is that man saved harmless from danger who is left to bear *one-half* of the damages himself? The question seems to me too plain for discussion." * * *

"In violation of this treaty, the slaves, and other property of American citizens, were carried away in the year 1815, and have been detained from them ever since. They have thus lost the *use* of this property for *eleven years*. Is the meagre return of the average value at the time the slaves and other property were thus taken from them a *just indemnification of the whole wrong?* That the act of taking away the property *was a wrong* is no longer a question. Whatever disposition there may be to make it a question, it has been settled by the tribunal of the party's own choice, and can no longer be made a question. The first act of dispossession being thus established to be a wrong, is the continuance of that dispossession for eleven years no wrong at all? Is it consistent with that usage of nations which Sir John Nicholl recognizes to redress an act of wrongful violence by the return, *at any distance of time*, of the naked value of the article at the date of the injury?" * * *

"Upon the whole, sir, I am of the opinion that the just indemnification awarded by the emperor involves not merely the return of the value of the specific property, but a compensation also for the subsequent and wrongful detention of it, in the nature of damages. If the actual damages in each case could be ascertained, they ought, under the award, to be decreed; but since this, if not impracticable, would be a work of great labor and time, I am of opinion that the interest, *according to the usage of nations*, is a necessary part of the just indemnification awarded by the emperor of Russia."—(2 Opin. Attorney Gen., pp. 31, 32, 33.)

Subsequently, Mr. Clay, Secretary of State, in a letter addressed to Mr. Vaughan, the British minister, adopted and fully approved these views. He said: "We are prepared to show, if it were proper now to enter upon this discussion, that *interest* is a fair and just component part of the indemnification which the convention stipulates, and that, *without* interest, it would fall far short of the intentions of his Imperial Majesty's decision."

These claims were finally compromised between the United States and Great Britain. The United States accepted the payment of the gross sum of $1,204,960. Mr. Cheves had previously estimated the claims at $1,250,000, including principal and interest, the interest being about $464,000. In the compromise, therefore, the United States received $418,000, instead of $464,000, for *interest*. They did not, therefore, yield the *principle*, under which they had so str-

ously insisted they were entitled to interest. On the contrary, it was, in substance, conceded to them. And the commission appointed by the government of the United States to adjust these claims awarded to each claimant the value of his property carried away, with *interest* thereon from the time of the exportation, thus recognizing the principal value and *interest* thereon as the proper measure of indemnity.

The brigs Encomium and Comet were wrecked on the keys of the Bahamas, and slaves on board belonging to citizens of the United States were forcibly seized and detained by the local authorities. Indemnity was immediately demanded by the government of the United States of the British government. The result was, that the British government paid to the United States the value of the slaves, with *interest* on such value, at the rate of four *per centum per annum*, from the date when the slaves were seized by the officers of the customs at the Bahamas up to the period when the compensation was actually paid, and the expenses incurred by the claimants in procuring evidence to support their claims.

Our minister, the Hon. Andrew Stevenson, who, with distinguished ability, conducted, on the part of the United States, much of the negotiation which occurred in these cases between the two governments, and successfully brought them to a close, in his letter to Lord Palmerston of December 4th, A. D. 1838, said: "The last and remaining question is that of interest on the estimated value of the slaves, and the time from which it should accrue. That the claimants have the same right to interest on the value of these slaves that they have to the value of the slaves themselves, and that, too, from the period of their seizure and detention, is a proposition which the undersigned would not have deemed it either necessary or proper to discuss, if he did not understand the decision of her Majesty's government, communicated in Lord Palmerston's note, as asserting directly the contrary doctrine. Regarding such a decision, upon principle, as of much higher importance than even the pecuniary interests which it involves, the undersigned feels it incumbent on him, in dissenting wholly from the grounds taken by her Majesty's government, to give the subject a more particular examination than he should otherwise have felt it needful to do." * * "It has, moreover, never been refused in claims like the present, where a money equivalent has been substituted as a compensation for property wrongfully withheld, and for which the party had agreed to make reparation."

He examined the subject at considerable length, and with great ability, both upon principle and authority. "The general doctrine, then," he said, "is this: that he who withholds what he ought to return, does an injury for which he is bound to indemnify the sufferer; that the proper measure of indemnification is the thing which is withheld, together with its reasonable fruits or profits accruing during the period that it is so withheld; that if restitution of the property, however, cannot be had, justice finds its compensation in its value as an equivalent, and interest on it is resorted to as the best standard by which to ascertain the reasonable profits of money."—(Senate Doc., 3d session 25th Cong., No. 216, p. 53.)

Subsequently, Lord Palmerston, in his letter to Mr. Stevenson of

May 2, A. D. 1839, said: "Her Majesty's government is, moreover, of opinion that, considering all the circumstances which have delayed the admission and adjustment of these claims, interest, at the rate of four *per cent. per annum,* may, with justice, be demanded from the British government upon the sums assigned as compensation on account of the slaves in question, and that such interest ought to run from the dates when those slaves were seized by the officers of the customs at the Bahamas up to the period when the compensation shall be actually paid."—(Senate Ex. Doc., 1st sess. 25th Cong., No. 119, p. 8.) It is fair to conclude, therefore, that the British government, against whom the demand for compensation was made, fully concurred with that of the United States in the principle, that in such cases interest justly constitutes a part of the indemnity.

By the convention of the 11th April, A. D. 1839, between the United States and Mexico, provision was made for the appointment of a commission, to which should be referred the claims of citizens of the United States upon the Mexican government, and power was given to the commissioners "to decide upon the justice of the said claims and the amount of compensation, if any, due from the Mexican government in each case."—(8 Stat. at L., 528, 530.) The commission allowed to the claimants the value of their property taken, with interest from the time the wrong was committed.—(Ex. Doc., 27th Cong., 2d sess., vol. 5, No. 291, pp. 30, 50, 61.)

In the case of the claims of citizens of the United States against Brazil, interest was claimed and allowed.—(Ex. Doc., 1st sess., 25th Cong., H. of Rep., Doc. 32., p. 249.)

Other instances might be cited, but these, surely, are sufficient to show, not only the views, but the uniform practice of the government of the United States upon this subject. I am warranted by them in laying it down as a rule, fully recognized by the United States, that in all cases like the present, where satisfaction is to be made for injuries done to personal property, interest is justly demandable as a component part of the damages. Our diplomatic agents, as we have seen, have always insisted that this doctrine was sustained, not only by the law of nations, but by both the civil and common law.

"In estimating," says Rutherforth, "the damages which any one has sustained, where such things as he has a perfect right to are unjustly taken from him, or withholden, or intercepted, we are to consider, not only the value of the thing itself, but the value, likewise, of the fruits or profits that might have arisen from it. He who is the owner of the thing is, likewise, owner of such fruits or profits, so that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself."—(Rutherforth's Institutes, B. I, ch. 17, § 5, p. 390–1. See, also, 1 Domat, Book III, tit. V, sections 1, 2, and 3, pp. 740, 789, Cushing's ed.)

When a nation cannot obtain justice, whether for a wrong or an injury, she has a right to do herself justice. Among the various methods practiced among nations, short of actual war, of obtaining satisfaction, is "by making reprisals upon the persons and things belonging to the offending nation until a satisfactory reparation is made for the alleged injury."—(Wheaton's Inter. Law, part IV, ch. 1.

"Reprisals are used between nation and nation in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, *to repair an injury*, or *to give adequate satisfaction for it*, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, *together with interest and damages*, or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then reprisals are accomplished."—(Vattel, Book II, ch. 18, § 342. See, also, Wheaton's Inter. Law, part IV, ch. 1, § 3.) If Spain had failed to obtain, by treaty, satisfaction for the injuries which her subjects had suffered, she might lawfully have resorted to the harsher method of reprisal. But what she might rightfully have obtained by force, if it had been denied her, was voluntarily stipulated for and promised by the treaty. It needs no argument to show that the measure of satisfaction must be the same in the one case as in the other.

The decisions of the courts of admiralty are based on the law of nations. "The court of prize is emphatically a court of the law of nations, and it takes neither its character nor its rules from the mere municipal regulations of any country."—(Per Story, J., in delivering the opinion of the court in the case of the Schooner Adeline, 9 Cranch R., 284.) It is believed to be the uniform rule of those courts, in decreeing satisfaction for wrongs, in cases not calling for aggravated or vindictive damages, to take the value of the property lost, at the time of the loss, and, in case of injury, the diminution in value by reason of the injury, with *interest* upon such valuation, as the true measure of damages. The Amiable Nancy, 3 Wheaton, R., 546, 560–1: "This rule," says the court in that case, "may not secure a complete indemnity for all possible injuries; but it has certainty and general applicability to recommend it, and, in almost all cases, will give a fair and just recompense."—(3 Wheaton R., 560–1.) The same doctrine had been previously held in the cases of Del Col *vs.* Arnold, 3 Dall. R., 333, and The Ann Maria, 2 Wheat. Rep., 327. See, also, the cases of Murray *vs.* Schooner Charming Betsy, 2 Cranch R., 64; Maley *vs.* Shattuck, 3 Cranch R., 458; Schooner Lively, 1 Gallison R., 315, 322; all of which are accordant. In the case of the Appollon, 9 Wheat. R., 362, 377, Story, J., in delivering the opinion of the court, stated the rule thus: "Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with *interest* upon the amount from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense, and the addition of ten *per cent.* has been sometimes made, where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have

been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be truly said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation upon principles of public policy."

The decisions of the admiralty courts of Great Britain are in accordance with those in the United States in regard to the allowance of interest, as constituting a part of the measure of damages in such cases. The Acteon, 2 Dodson R., 48; The Lucy, 3 Rob. R., 208; The Driver, 5 Rob. 145. The council of prizes in France, in the case of The Pigon, reported in a note to Schooner Charming Betsy, 2 Cranch R., 98, 101, recognize the same rule.

At the common law, in cases of torts, the party injured, where there are no circumstances of aggravation, is entitled to satisfaction for the injury sustained by the taking and detention, and the measure of damages is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered the extent of the damages sustained, and is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated. Such is the rule in action of trespass and of trover.—(Conrad *vs.* The Pacific In. Co., 1 Bald. R., 138; S. C., 6 Peters R., 262; Conrad *vs.* Nicoll, 4 Peters R., 291; Fisher *vs.* Prince, 3 Burr. R., 1363; Mercer *vs.* Jones, 3 Camp. R., 476; Dillenback *vs.* Jerome, 7 Cowen R., 294; Barry *vs.* Bennett, 7 Metcalf R., 354; Banks *vs.* Hatton, 1 Nott & McCord R., 221; White *vs.* Webb, 15 Conn. R., 502; Jacobs *vs.* Laussat, 6 S. & R., 350; Wilson *vs.* Conine, 2 Johns. R., 280; New Orleans Draining Co. *vs.* De. Lazardi, 2 La. Ann. R., 281; Baker *vs.* Wheeler, 8 Wend. R., 504; Stevens *vs.* Lowe; 2 Hill, R. 133; Clark *vs.* Whitaker, 19 Conn. R., 320.) Many other cases might be cited, but these are surely sufficient. If there be any case in which the doctrine that interest should constitute a component part of the measure of damages in such cases is even questioned, I am not aware of it.

There can be no doubt, then, that the practice of the United States, in their intercourse with foreign nations, in relation to this subject, and the doctrine which their diplomatic agents have uniformly asserted and maintained, are fully supported by the well-established principles of both public and municipal law.

IV. I propose, now, briefly to consider at what time, according to the treaty, the title of the petitioner's intestate to the satisfaction contemplated by the treaty would become absolute. Upon this point, it seems to me, there is no room for doubt. The stipulation of the United States is express, that they will cause satisfaction to be made for the injuries, if any, which by process of law shall be established. As soon, therefore, as the injury should be thus established, this stipulation would become direct and unconditional. The pecuniary value of the injury would then be ascertained, and the obligation to pay it perfect and complete. The object of requiring the injury to be estab-

lished was twofold: (1) to determine its existence, and (2) to fix its value in money. As soon, then, as the injury should be established, the treaty would become, in effect, a stipulation on the part of the United States to pay the money equivalent thus ascertained. The treaty then would, in effect, be the same as if the injuries had been already established at the time of making the treaty, and the stipulation had been direct to pay the amount thereby ascertained. Therefore, upon the rendition of the judgment establishing the injury, the United States would become absolutely bound to pay *the amount* thereof to the petitioner. This, it seems to me, is self-evident.

It seems to me, therefore, regarding this case as it stood under the treaty, to be clear, (1) that the petitioner's intestate was entitled to the benefit of the ninth article of the treaty; (2) that under that article he was entitled to a judicial tribunal, before which to have the injury which he suffered established; (3) that the satisfaction contemplated by the treaty was the value of his property which was lost or destroyed, with interest on such value from the time of its loss or destruction, at least till the date of the judicial establishment of the injury; and (4) that, u pn the judicial establishment of the injury, the United States would become absolutely and unconditionally bound to pay the pecuniary value of the injury thus ascertained, to wit, *the amount* of the judgment. Such, it seems to me, were the clear and indisputable rights of the petitioner's intestate under the treaty. If this be true, then the public faith of the United States was pledged to Spain that they should be secured to him; and the United States were bound by the faith of treaties—that most sacred of all obligations among the nations of the earth - well and truly to redeem this pledge, not merely in form, but in substance.

V. It remains now to inquire whether Congress has adequately provided for the faithful execution of the ninth article of the treaty. With the utmost deference and respect for those who differ with me on this point, I venture to express the opinion—for it is abundantly clear to my mind—that such provision has been made, and made, too, to carry that article into effect in precise accordance with my construction of it.

I cannot be wrong in saying that it is proper, in construing the acts of Congress passed for this purpose, to consider them in connexion with the ninth article of the treaty; to regard them and the ninth article as constituting one whole; and so to construe them as, if possible, to make them harmonize with that article, and with each other. "This understanding of the article must enter into our construction of the acts of Congress on the subject," said Mr. Chief Justice Marshall, in United States *vs.* Perchman, 7 Peters' R., 89. There can be no doubt that the act of 1823 was passed to carry the ninth article of the treaty into effect. Its object is expressly declared in the title, and plainly set forth in the enacting clauses. Such, indubitably, was its intention.

If, then, Congress did not, by the act of 1823, adequately provide for carrying into effect the ninth article of the treaty of 1819, it was not because they did not *intend* to do so, but because that intention has not been sufficiently declared. In the construction of that act,

therefore, our attention must be directed not so much to the inquiry as to what was in the mind of the legislature at the time of its enactment, but to the meaning of the language which was employed. The object of the law is known to us with indubitable certainty. But the reason of the law—that is to say, the motive which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly *know* the *reason* which *alone* has determined the will of the person speaking, we ought to interpret and apply his words in a manner *suitable* to that *reason alone*. Otherwise he will be made to speak and act *contrary to his intention and in opposition to his own views*.—(Vattel, Book II, ch. 17, § 287.) It is a rule in the interpretation of a deed—indeed, the general rule for all interpretations—that when we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.—(Ibid., § 270.) And when we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning.—(Ibid., § 274.) And we ought always to affix such meaning to the expressions as is most suitable to the subject or matter in question.—(Ibid., § 280.)

Let us apply these rules to the construction of the act of 1823. That act was passed to carry into effect the ninth article of the treaty of 1819. This was the motive which led to its passage, and the object in contemplation at the time. It was the reason which alone determined the will of the legislature in its enactment. We ought, then, to interpret and apply its words in a manner suitable to that reason alone, otherwise the legislature may be made to speak *contrary to their intention*, and *in opposition to their own views*. The treaty, as we have seen, requires that Congress should provide a judicial tribunal, before which the claimants should be afforded an opportunity of presenting their claims in order to their establishment. This was one of the leading objects of the treaty. Was effect given to it by the act of 1823? The first section of that act refers those claims to the decision of "the *judges of the superior courts* established at St. Augustine and Pensacola, in the Territory of Florida, respectively." At that time the judicial power in Florida was vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the Territory might, from time to time, establish. Each superior court consisted of one judge.—(3 Stat. at L., p. 656, § 6.) The judges, then, of the superior courts of Florida were *judicial magistrates*, in the proper sense of those terms. They are described in the first section of the act of 1823 by their official titles, and a duty, judicial in its nature, is assigned to them. The duty is judicial in its nature, because the injuries were to be judicially established. I do not pause to inquire whether, inasmuch as each of those courts consisted of one of those judges, in assigning jurisdiction to the judge, the act did not *ipso facto* assign jurisdiction to the court? It

is not necessary to express an opinion whether such was the effect of the act. But whether it was or not, is, in my view, not material to the point now under consideration; for whether the assignment was to the one or the other, it was an assignment to a judicial court, or to a judicial magistrate. Considering the first section of the act of 1823 with reference to the rules of construction, to which I have adverted, it is clear to my mind that, it being already known and declared in effect by the act itself that the legislature intended to assign a judicial duty to a judge or a court, and in the act the judge is described by his official character, and authority is given him "to receive and adjudge," the duty is *judicial*, and imposed upon him in his judicial character. But when, in addition to this, the claims thus to be adjudged are described as *all claims arising within his jurisdiction*, there does not seem to be room for the slightest doubt, for it is in his judicial character, *and in that alone*, that the judge has *jurisdiction*.

It will be observed that I have used the word "adjudge." The term used in the first section of the act is "adjust." It is too plain to require an argument to prove it, that the word "adjust" is there used in the sense of "adjudge." In the second section, the judges are said to *decide*, and the result of their acts is spoken of as *decisions*, and the proper word "adjudge," in connexion with their acts, is actually used. And, moreover, they are required by the first section to receive and *adjust* the claims "*agreeably to the provisions of the treaty*," and they could not *adjust* them *agreeably* to the provisions of the treaty otherwise than *judicially*, for the treaty required that they should be *judicially* established. The terms used in the treaty are "*by process of law * * * established.*" It certainly cannot be necessary to state what is meant when we say that a matter shall be *judicially established*.

This construction conforms to the ideas of the legislature in the enactment of the law; it does not wrest their words to a meaning contrary to their intention; and it affixes to the words used the meaning most suitable to the subject-matter in question. Full force and effect are given to each word, and each word is construed according to its ordinary meaning. The only seeming exception is, in interpreting the word "adjust" in the sense of "adjudge." For this, however, adequate reason has already been assigned. It is required by the subject-matter to which it refers, and its connexion with and relation to the other words in the section. It is also sustained by authority. Every statute ought to be expounded, not according to the letter, but according to the meaning.—(11 Rep., 73.) Hence *quantity* may be construed *value*, (Dwarris on Stat., 557,) and *value* may be construed *price*, where such was the intent.—(Marriott *vs.* Brune, 9 How. R., 619.)

Let us now see whether there is anything in the second section of the act of 1823 at all in conflict with these views. Here, again, the judges are spoken of by their official titles; mention is made of the cases in which they shall *decide* in favor of the claimants; and their acts are called *decisions*. It requires only the decisions *in favor* of the claimants to be reported to the Secretary of the Treasury. The reason for this is obvious. Those only whose injuries should be *judicially*

established were, under the treaty, entitled to the satisfaction thereby stipulated. Their cases, therefore, and theirs *only*, ought to have been reported to the Secretary of the Treasury. Where the decisions were *against* the claimants, their claims, so far from being *judicially* established, were *judicially* rejected, and, therefore, did not come within the provisions of the treaty. They had failed to comply with the condition on which the title to satisfaction depended. If it had been the intention of the statute to confer on the Secretary of the Treasury a revisory appellate power over the decisions of the judges, it would strike every fair and impartial mind as an act of great hardship and injustice that the decisions of the judges should be final and conclusive when *against* claimants, but subject to revision and reversal when in their *favor*. Such an act of legislation, in reference to these claims especially, would have been wholly unjustifiable; and, to my mind, it is clear that such was not the intention or the effect of the act of 1823. Under my construction, the justice and propriety of the provision are clear and striking.

Thus far, then, the second section of the act of 1823 is consistent with the construction which I have put on the first section; and, to my mind, it is plain that in all other respects it is equally consistent with it. It declares that "the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the *same is just and equitable, within the provisions of the said treaty*, shall pay *the amount thereof* to the person or persons in whose favor the same is adjudged." Let it be borne in mind that it was the duty of Congress, if the ninth article of the treaty was to be carried into effect at all, to provide (1) the ways and means by which the claims might be established; and (2) that, when established, due satisfaction should be made. The stipulation of the treaty extended alone to claims "which, by process of law, shall be established." The first object is provided for in the first section, and the second section provides for the second object. As the satisfaction was to be made in money, it was proper to provide that, when required for that purpose, it should be drawn from the public treasury under such guards as to protect the United States from injustice. It was only necessary, therefore, to devolve a mere *executive* duty upon the Secretary of the Treasury; and this, it seems to me, was precisely the character of the duty imposed upon him. It would have been impolitic to have made it merely *ministerial*, but it would have been unjust, and a breach of the public faith, to have made it anything more than merely *executive*.

Let me inquire what, in all fairness, as well to the claimants as to the United States, ought to have been the substantial provisions of the second section of the act of 1823? It will occur at once to every just and impartial mind, that the claimant, on presenting himself at the Treasury Department, ought to have been required to show (1) that his claim had been *judicially established*, as required by the treaty and the first section of the act; and (2) that his case was one which the judge, who decided it, was authorized to decide. Nothing more and nothing less ought to have been required. Nothing more *could* have been required without a violation of the treaty; and noth-

ing less, without an omission of the usual vigilance with which the public treasury is guarded. As soon as the injury of which he complained was judicially established, the claimant, as we have seen, became absolutely entitled to the satisfaction provided for in the treaty; and nothing further could justly have been required of him than that, when he presented his claim to the Treasury Department for payment, he should show the judgment and the authority of the judge who rendered it.

These requirements would be in precise accordance with what occurs in reference to all judicial proceedings. Whenever a judgment is relied on, whether the court had jurisdiction, is always an open question. The want of jurisdiction may always be set up against a judgment, whenever it is sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction renders it utterly void and unavailable for any purpose. "They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."—(Elliott *vs.* Peirsol, 1 Peters' R., 340.) But the jurisdiction being established, the judgment becomes conclusive of the matters determined by it, as between the parties thereto.—(Ibid.; Rose *vs.* Himley, 4 Cranch R., 241, 269; Thompson *vs.* Tolmie, 2 Peters' R., 163; Wilcox *vs.* Jackson, 13 Peters' R., 511; Lessee of Hickey *vs.* Stewart, 3 How. R., 762, 763.)

Let me now proceed with the examination of the second section of the act of 1823. It requires the *evidence* on which the decisions are founded to be reported to the Secretary of the Treasury, and this, it has been supposed, is indicative of an intention in the act to confer upon that officer a revisory power over the decisions. But it is obvious that this was necessary, whether the power of the Secretary was to be revisory, or merely executive, and confined to the inquiry whether the judge had jurisdiction. All jurisdiction is limited as to place, persons, and things.—(Per Holt, C. J., in Annesley *vs.* Dixon, Rep. Temp., Q. Ann., 104, 105.) "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the *state of the thing* as on the constitution of the court. If, by any means, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemne[1], arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."—(Per Mr. Chief Justice Marshall, in Rose *vs.* Himley, 4 Cr. R., 269.) "The power under which it acts must be looked into; and *its authority to decide questions, which it professes to decide, must be considered.*"—(Ibid.) It is plain, therefore, that the evidence was as necessary to enable the Secretary to act upon these points, as upon the essential merits of the case. But why report all the evidence? Why not confine the report to so much of the evidence as might bear upon the

question of jurisdiction? It would have been much easier to give a general direction for this purpose than to carry it into effect; and if its execution would be at all practicable, of what advantage would it be? Every lawyer knows that but little, if any, practical good could result from it, whilst the duty which it would impose upon the judge would be exceedingly onerous and of difficult performance. It was simpler, and easier, and better, for all purposes, that the direction should have been general to report *the* evidence on which the decision was founded. It cannot be necessary to enlarge on this point.

But the Secretary of the Treasury must be satisfied "that the same is just and equitable, within the provisions of the said treaty." If these words gave him a revisory power, then the action of the judge was not *judicial*, and the injury was not *established* by his decision. Such a construction would render the act of 1823, which was professedly passed to carry the ninth article of the treaty into effect, altogether inconsistent with that article, and inconsistent with every other provision in the act itself. But it must not be forgotten that words and expressions have different force, sometimes even a quite different signification, according to the *occasion*, their *connexion*, and their *relation* to other words. The connexion and train of the discourse is, therefore, a proper source of interpretation. We must consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification which it may *individually* admit of, as that which it ought to have from the *context* and *spirit* of the discourse. Such is the maxim of the Roman law. *In civile est, nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ, judicare, vel respondere.*—(Vattel, Book II, ch. 17, § 285.) We must interpret the act in such a manner that *all* the parts may appear *consonant* to each other, that what follows may agree with what preceded, unless it *evidently* appears that by the subsequent language the legislature intended to make some alteration in what preceded. The presumption is, that one and the same spirit reigned throughout the entire statute.—(Ibid., § 286.) In interpreting a statute, too, we must never lose sight of its *object*, for that is the truest exposition of a law which best harmonizes with its design, its objects, and its general structure.—(Dwarr. on Stat., 556.) The real intention, when collected with certainty, will always, in statutes, prevail over the literal sense of terms; for every statute ought to be expounded, not according to the letter, but according to the meaning.—(Ibid., 557.) And whilst it is true that the intention must be collected from the words used, still, in determining the meaning of the words, all the parts of the statute are to be compared, considered, and construed with reference to each other. Hence, general words may be restrained, and clauses may be controlled by clauses.—(Ibid., 574.)

I am warranted, then, in saying that if the words "just and equitable," in their largest and most comprehensive sense, would have the effect of giving a revisory power to the Secretary of the Treasury, thereby rendering the statute inconsistent with the treaty, and inconsistent with itself, and subversive of its professed object, then a more limited interpretation, which will avoid such a result, ought to be put upon them if they be fairly susceptible of such an interpretation.

Upon this point, to my mind, there is not the slightest difficulty. Indeed, it seems to me—and I express the opinion with deferential respect for the opposite view—that any other than the more restricted interpretation would do violence to the plainest dictates of reason, and to the well established principles of construction, to the obvious import of the words in the connexion in which they stand. Let me here repeat that, in considering this point, justice demands that we should bear in mind that the ninth article of the treaty requires, and that the first section of the act provides, that the injury, for which satisfaction was to be made, should be judicially established. This was to be done before the case could be carried to the Secretary of the Treasury. Upon the decision, together with the evidence, being presented to him, he was to consider whether the same was "just and equitable, within the provisions of the said treaty." In determining this question, he was, it seems to me, in the nature of things, to consider (1) whether the injury had been judicially established; (2) whether it had been so established by the tribunal constituted by the act; and (3) whether it was a case coming properly within the jurisdiction of that tribunal. If these several points should be settled in the affirmative, then, to my mind, it is clear that the decision would be just and equitable, within the provisions of the treaty, in the true sense of those terms as they are there used. It had been rendered as required by the treaty and by the first section of the act passed to carry the treaty into effect, and how could it be said to be otherwise than just and equitable within the provisions of the treaty? It would stand before the treasury with its justice and equity proved and sustained by precisely the evidence which the provisions of the treaty require.

The Secretary of the Treasury was the officer through whom the satisfaction required by the treaty was to be made. To entitle a party to that satisfaction, to the payment of the money at the Treasury Department, he ought to be required to show a case just and equitable within the provisions of the treaty. This he would indubitably do by showing a case sustained by the evidence contemplated and required by the treaty. That evidence was a judgment rendered by a court of competent jurisdiction, establishing the injury for which he would demand satisfaction. If any more should be required, it is plain that the treaty would be violated, for by it the public faith of the United States was pledged that satisfaction should be made for the injuries which should, by process of law—*i. e.*, *judicially*—be established. The question to be presented to the Secretary of the Treasury was not whether, *agreeably* to the provisions of the treaty, an injury had been committed. That question had been decided, and decided, too, by the tribunal contemplated by the treaty and provided by the first section of the act. But the question before him was, whether, considering the case at the particular stage which it had reached when reported to him, the decision was "just and equitable, within the provisions of the said treaty?" A proper interpretation of the provisions of the treaty, in this respect, is clearly what I have just stated—that within those provisions the decision was just and equitable, if duly made, in a treaty case, by the proper tribunal.

The only thing which remained to be done, after the decision was

made, was to pay the amount thereof, to make the satisfaction; and this was demanded not only by justice and equity, but by the faith of treaties. It surely cannot be pretended that in considering whether a decision was "just and equitable" the Secretary of the Treasury should have no reference to the treaty. The language used is "just and equitable within the provisions of the treaty," and not "just and equitable *and* within the provisions of the treaty." If no reference was to be had to the treaty, then it would have been the duty of the Secretary of the Treasury to consider whether, though the losses occasioned by the troops of the United States were, in fact, injuries, there were, nevertheless, not circumstances connected with our relations with Spain which rendered it unjust and inequitable that satisfaction should be made. But his powers indubitably did not extend that far. It was not meant that he should go behind the treaty. But if this be true—and that it is there can be no question—then the words "just and equitable" are not to be understood in their largest sense. The only question then is, what restriction is required? They are clearly to be limited by the treaty. If this be so, the conclusion at which I have arrived seems to me to be inevitable.

Taking my construction to be correct, we have no difficulty in understanding the remaining provisions of the second section of the act of 1823: "shall pay *the amount thereof* to the person or persons in whose favor the same is adjudged." The amount of what? Plainly, of the decision, which the Secretary of the Treasury had become satisfied was just and equitable, within the provisions of the treaty. This was precisely the provision which good faith required. If the injury was established by a judicial decision rendered by a competent tribunal, then the satisfaction was due, and the precise satisfaction which had been adjudged. The Secretary of the Treasury ought, therefore, to have been, and to my mind it is plain that he was, required in every such case to pay *the amount* of the decision. If there were no *such decision*, then there was nothing due, and by implication the act directs that in such a case nothing shall be paid. The whole of the decision was due or none, and the whole or none was just and equitable within the provisions of the treaty. The word "same" in that part of the section, which reads "on being satisfied that the same is just and equitable," refers to the decision of the judge, and the subsequent words "the amount thereof" also refer to the decision of the judge. It necessarily follows, that the words "same is adjudged" refer to *the amount of the decision*; so that this part of the section written in full would read: "on being satisfied that the decision *of the judge* is just and equitable, within the provisions of the said treaty, shall pay the amount of *the decision of the judge* to the person or persons in whose favor *the amount of the decision of the judge* is adjudged." It cannot, I am sure, be denied that such is the correct grammatical construction of this part of the second section. I admit that a departure from the grammatical sense of words may be allowed, but I venture the assertion that a case cannot be found where it has been sanctioned to defeat the object of the act. Where the grammatical sense of words is consistent with the motive which led to the passage of the act, and necessary to give effect to the object comtemplated by

it, the grammatical sense is surely not to be departed from, but to be adopted as giving the true meaning of the statute. Such is alike the dictate of reason, and the well established rule of law.—(Dwarris on Statutes, 587.)

If, then, the grammatical construction of that part of the second section, to which I have just referred, be its proper construction, the words "just and equitable" in their larger sense are wholly irreconcilable with it. To give those words such larger sense, it is necessary either to make the words "the amount thereof" refer to the decision of the Secretary of the Treasury, or to strike out the word "the" and read as follows; "such amount thereof as he may deem just and equitable." According to the first view, this part of the second section written in full would read: "shall pay the amount of the decision of the Secretary of the Treasury to the person or persons in whose favor the amount of the decision of the Secretary of the Treasury is adjudged." According to the second view it would read: "shall pay so much of the decision of the judge as the Secretary of the Treasury may deem equitable and just, to the person or persons in whose favor so much of the decision of the judge as the Secretary of the Treasury may deem equitable and just is adjudged." Written as far as practicable with the relatives, according to the first view, it would read as follows: "shall pay the amount of the decision of the Secretary of the Treasury to the person or persons in whose favor such amount is adjudged." And written as far as practicable, with the relatives according to the second view, it would read as follows: "shall pay so much of the decision of the judge as the Secretary of the Treasury may deem just and equitable, to the person or persons in whose favor the same is adjudged by the Secretary of the Treasury." It is indisputable that the words "just and equitable" cannot be so interpreted as to give the Secretary of the Treasury a revisory power over the decisions of the judges, without taking such liberties with the subsequent part of the second section of the statute. Can this be justified by any principle of law or reason, when its necessary effect is to defeat the expressed object of the statute, and to impute bad faith to Congress? A case which will justify such a liberty for such a purpose, I venture most respectfully to affirm, cannot be found in the annals of jurisprudence. The great principles of justice, as well as the established rules of construction, and the decided cases, the rather dictate that the words "just and equitable" should be received according to a more restricted meaning.

The construction which I have given to the second section of the act of 1823 seems to me, therefore, to be the only construction of which the language there used is fairly and justly susceptible. It is, too, the only construction consistent with the treaty, and consistent with the first section of the act. Under it, and *it alone*, can the treaty, and the act of 1823 passed to carry the treaty into effect, be made a symmetrical and harmonious whole.

The construction which makes the judges mere commissioners, and gives the Secretary of the Treasury a revisory, appellate power over their decisions, renders the act, which was designed to carry the treaty into effect, ineffectual for that purpose. In doing this it departs from

the usual meaning of the words used, by declaring that in saying that *judges* shall *decide*, it meant that *commissioners* shall *award*; and that in saying that the claims should be received and *adjudged agreeably to the provisions of the treaty*, it meant a wholly different thing, to wit: the action of the commissioners, whose award, instead of *establishing* the injuries as the treaty requires, should only have the effect of a *master's* report in chancery, and be revised by the Secretary of the Treasury, who is not a judicial officer. It, moreover, gives to the words "just and equitable," which are always words of a relative meaning, to be received in a larger or more restricted sense, according to the connexion in which they stand, the most latitudinous construction, the effect of which is, to make it necessary to reject the natural and grammatical sense of the subsequent part of the second section, by making the words "amount thereof" refer to the action of the Secretary of the Treasury. And all this is done in utter disregard of the reason which alone determined the will of the legislature in the enactment of the statute, and in entire obliviousness of the avowed object for which it was passed. I, with humble deference, submit that this interpretation is a clear and palpable violation of the established rules of construction, and of the plain meaning of language.

It will be observed that I have thus far made no reference to the case of the United States *vs.* Ferreira, 13 How. R., 43. To the *actual decision* in that case, I yield implicit submission. I regard it as a part of the law of the land, and if it should ever come in question before me, I should feel that my conscience was bound by it. I yield to no man in profound respect for the opinions of the Supreme Court of the United States in all cases coming within the limits of their jurisdiction. But the reasoning of the court in making the decision in the case of the United States *vs.* Ferreira, though entitled to high, very high, respect, is not necessarily a part of the law of the land. The decision is authoritative; the reasoning of the court merely persuasive. The one, as a precedent, and to the same extent as other precedents, must be obeyed; the other respected only. The one may be a principle, and as such to be taken as established and unquestionable; the other is mere argument, and to govern only when it convinces. In the case of Richardson *vs.* Mellish, 2 Bing. R., 229, Best, C. J., said: "There are expressions used by the Chief Justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. *The manner in which he is arguing it is not the thing; it is the principle he is deciding.*" And Marshall, C. J., in Cohen *vs.* Virginia, said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connexion with the case in which those expressions are used. If they go beyond the case, they may be *respected*, but ought not to *control* the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question *actually before the court* is investigated with care, and considered in its full extent. Other principles which may serve to illus

trate it are considered in their relation to the case decided, but their possible bearing in all other cases is seldom completely investigated."

What, then, was decided in the case of the United States *vs.* Ferreira? Merely that the Supreme Court had no jurisdiction in that case. This was the principle decided, and the only principle which could have been decided, because no other was involved in the case. The decision may be, and I *doubt not* is, altogether sound and correct, and still the reasoning of the court unsatisfactory. There may be, and my own conviction is that there are, other grounds, wholly unquestionable, on which the decision might have been placed. It is clear to my mind that, whether the judges of Florida, under the acts of 1823 and 1834, acted as commissioners or as judges; whether their functions were judicial or those of commissioners merely, still the decision of the Supreme Court must have been precisely what it was. Even if the decision of the Florida judge had been regarded by the Supreme Court as technically a judgment, it certainly was not one of those cases to which the appellate power of that court has been extended by Congress; and there can be no doubt that the whole appellate power of that court exists only in those cases in which it is affirmatively given.—(Wiscart *vs.* Dauchy, 3 Dallas' R., 32; Clark *vs.* Bazadone, 1 Cr. R., 212; the United States *vs.* More, 3 Cr. R., 159; Durousseau *vs.* the United States, 6 Cr. R., 307.)

I am not at liberty, then, in the discharge of my duty in this case, to be governed by the reasoning of the Supreme Court in the case of the United States *vs.* Ferreira, unless I am convinced by it. Notwithstanding the high source from which it comes, entitling it to the gravest and most careful consideration, still it would not be an honest and faithful discharge of my duty to do more than respectfully to weigh it, and give it that influence to which it is intrinsically, independently of its origin, entitled. It is not authority, which I must obey; it is merely the argument of a great man and of an enlightened court, upon which I am bound to bestow my best reflections and most careful deliberation. This I have done, and I trust that I may be pardoned for the presumption in saying that it has not convinced me. To be governed by it in this case would leave my conscience unsatisfied, and I can safely recognize no other monitor.

I do not propose to enter into a critical examination of the reasoning of the Supreme Court. That court itself, I know, would concede that, if Congress by the act of 1828, intended to impose a judicial duty upon the judges of the superior courts of Florida, it had full power to do so, and that such a duty was imposed, if the words of the act sufficienty express that intention. For the reasons which I have already assigned, my opinion is that such was the intention and effect of the act.

I may, however, be allowed most respectfully to suggest, that if, under the acts of 1823 and 1834, there was to be no suit, no parties in the legal acceptance of the term were to be made, no process to issue, and no one was authorized to appear on behalf of the United States, or to summon witnesses in the case, it was because Congress did not, in its wisdom, deem it necessary or expedient to make a different provision. And if the proceeding was altogether *ex parte*, and all that

the judge was required to do was to receive the claim when the party presented it, and to adjust it upon such evidence as he might have before him, or be able himself to obtain; and if both the decision and the evidence were to be reported to the Secretary of the Treasury, and not filed in the court in which the judge presided, or recorded there, it was because Congress, in the exercise of the power "to regulate" the proceedings of the tribunal, saw fit so to provide. But the conclusion which has been deduced from these premises, that "it is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one," I most deferentially submit, is a *non sequitur*. I do not understand the Supreme Court as affirming that a provision for any one or more of these purposes is essential to the constitution of a judicial tribunal. But if it was not, then the argument loses all its force. It seems to me that if Congress saw fit to waive, on the part of the United States, all advantage to be derived from this source, it had the power to do so. And it will be observed that it was as necessary to the protection of the real interests of the United States and of all concerned, before the judges as commissioners, as before them in their judicial capacity.

I beg leave also, with deference, to suggest, that possibly it may have been the intention of Congress that the statutes, to which I have referred, and the act of March 3, A. D. 1822, entitled "An act for the establishment of a territorial government in Florida," (3 Stat. at L., p. 654,) should be so construed as to allow the two persons learned in the law, appointed under the latter act, "to act as attorneys for the United States as well as for the Territory" to appear in behalf of the United States in every case presented to the judges under either the act of 1823 or the act of 1834. It may, too, be the proper construction of the acts of 1823 and 1834 that, by implication, they conferred upon the judges the power to establish all needful rules and regulations, not inconsistent with those statutes, in regard to the mode of presenting and conducting cases under them. It seems to have been the practice to present claims under those acts by petition, and that practice is recognized by the very act, under which the case of United States *vs.* Ferreira was instituted, as a method of proceeding already known and established. It uses the language "that *the petition* for the allowance of such claim," and "that said parties shall, respectively, allege in such *petition*."—(9 Stat. at L., p. 788.)

The Supreme Court assign no reason for their opinion that the treaty did not require a judicial proceeding. My reasons for the contrary opinion have already been given. What was said by the Supreme Court on this point, I may be allowed, with the most perfect respect, to say, was a mere *dictum*.

It is no small relief to me in being constrained, by a solemn conviction of duty, to differ from the reasoning of the Supreme Court, to find that on one occasion, at least, that court, with the magnanimity for which it is distinguished, overruled its own solemn decision in reference to another part of the treaty of 1819. I refer to the case of United States *vs.* Perchman, 7 Peters' R., 81, overruling Foster *vs.* Neilson 2 Peters' R., 253, both of which have already been noticed. W
the decision of the Supreme Court, in the case of The United Sta

Ferreira, have been what it is, if the Spanish part of the treaty had been brought to their view, and the translations which have been furnished me by the counsel on both sides in this case been submitted to them?

The act of 1834 is an act in *pari materia* with the act of 1823, and so manifestly declaratory of the latter that it requires but little comment. I have already remarked upon its general features. It will be observed, that, under the act of 1823, the judges were required to adjudge claims under the treaty, and that, under the act of 1834, the judge of the superior court at St. Augustine was authorized to adjudge claims for losses in 1812 and 1813. The act of 1823, therefore, defines the *losses* in 1812 and 1813 to be *injuries* under the treaty. This was done by way of explaining the intention of the act of 1823, and of the treaty, in order that future mistakes on that point might be avoided. The treaty did not provide for the satisfaction of *losses*, but for the satisfaction of *injuries*. Losses might have been occasioned by the operations of the troops of the United States, and yet not be injuries; for if they could be justified by the law of nations, they were then *damna absque injuria*. The act of 1834 relieves the claims for losses in 1812 and 1813 from all difficulty on this point, and in effect declares them to be injuries, in the sense of the treaty.

If my construction of the act of 1823 be correct, it is plain that the decisions of the judges, referred to in the first section of the act of 1834, were *judgments* in the technical sense of that term. What, then, was meant by the direction that the Secretary of the Treasury should pay the amount of those judgments in all cases where the decision should be deemed by him to be just? Just with reference to what? There can be no doubt that the term is here used in precisely the same sense in which it was used in the act of 1823, and means *just* within the provisions of the treaty. If the decision was rendered by the proper tribunal, and in a proper case, then it was *just* in the sense of the treaty, and of the act of 1834. It would have been most unjust for Congress to provide in good faith for the establishment of those claims by judicial decisions, and then, in the next breath, wholly to deprive the decisions, thus establishing the claims, of the character and effect of judgments. Such legislation would have been a breach of the treaty. It would have been, in effect, to keep the word of promise to the ear, and break it to the hope. It might have been a literal compliance with the treaty, but it clearly would have been a substantial violation of it.

I have already shown that the act of 1834 makes no provision for the payment of the judgments authorized by its second section, and that they could only be paid under the act of 1823. The present case arose under the second section of the act of 1834. My remarks upon the act of 1823 are therefore applicable to this section.

But the term "awarded" is used in the act of 1834, and the decision of the judge is, in both provisoes of the first section of that act, called an "award;" and hence it is inferred that the judges were only commissioners. I respectfully suggest, that the effect of such a construction is to lay too minute a stress on the strict and precise signification of words. The strict and precise signification of words may

be upheld to effectuate the intention of the act, but not to defeat it. We must look to the effect and substance of the matter, and not to every nicety of form or circumstance. It is not, in general, a true line of construction to decide according to the strict letter of the act; but the courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. *Qui hœret in litera, hœret in cortice.*—(1 Co. Litt., Thomas's ed., 15; Per Lord Kenyon, C. J., 7 T. R., 196; Fowler *vs.* Padget, Id., 509; 11 Rep., 73; Vincent *vs.* Slaymaker, 12 East. R., 372; 3 Rep., 27.) But the second section of the act of 1834 used the word "adjudge," and this case comes under that section. Judges "adjudge," and commissioners "award." The letter of the law, therefore, is in favor of my construction. It is, too, not an uncommon expression to speak of "awarding a judgment," of the "award of a judgment," and of a "judgment awarded."

If, under a treaty existing antecedently to the treaty of 1819, the injuries occasioned by the troops of the United States to Spanish subjects had been established by judicial decisions, and afterwards by the 9th article of the treaty of 1819, the United States had stipulated to pay the amount of the decisions to the persons in whose favor they were adjudged, and then an act of Congress had been passed to carry the 9th article into effect, in the very words of the second section of the act of 1823, with the exception that the words "shall decide" were substituted by the words "have decided," could there be any doubt as to the meaning then to be given to the words "just and equitable?" If the more enlarged intrepretation, which would give to the Secretary of the Treasury the power to revise the decisions, should be put upon those words, then it would be so manifest that the act would be a gross and palpable and inexcusable violation of the treaty, that it would be impossible to believe that Congress could have intended to use them in that sense, whilst they were at the same time, *eodem flatu*, professing to carry the ninth article of the treaty into effect. In the cases of Talbot *vs.* Seaman, 1 Cr. R., 43, and Murray *vs.* Schooner Charming Betsy, 2 Cr. R., 118, the Supreme Court lay it down as a rule, that an act of Congress ought *never* to be construed to violate the law of nations if any other *possible* construction remains. This rule commends itself both by its wisdom and its justice, and it applies much more emphatically to a treaty than to the general principles of the law of nations, for "he who violates his treaties, violates at the same time the law of nations."—(Vattel, B. II, ch. 15, §221.) But how much is its force strengthened, when we come to apply it to a statute *passed expressly to carry a treaty into effect!* Under its influence, in the case supposed, it would not be regarded as a forced construction, to say that the words "just and equitable" should be construed "justly and equitably;" for surely it is no more difficult to convert "just and equitable" into "justly and equitably;" than it is to convert "quantity" into "value," and "value" into "price." Such changes, we have seen, may be made whenever they are necessary to effectuate the intention of the statute.—(Dwarris on Stat., 557; 9 How. R., 619.) Nor would it be considered, in the case supposed, *impossible* to conceive that Congress might have used the words "just and equita-

ble" merely to indicate to the Secretary of the Treasury that, in considering whether a decision was within the provisions of the treaty, he should not be guided by narrow and strictly technical rules, but by the broader principles of justice and equity, so as to carry out the treaty in good faith, and in a liberal and enlarged spirit. Such a construction would satisfy the words of the statute, preserve the public faith, and carry the treaty into effect. Even the construction which I have put upon the words "just and equitable," as they stand in the act of 1823, would be regarded as, at least, *possible*, and *if possible*, under the rule of the Supreme Court, would be adopted; for an act of Congress ought *never* to be construed to violate a treaty if any other *possible* construction remains.

But how does the case supposed differ from the case actually before us? I have already shown, that as soon as the injury was judicially established, the ninth article of the treaty became in effect a stipulation to pay the amount of the judgment, and substantially the same it would have been if the injuries had already been established at the time of making the treaty, and the stipulation had been direct to pay that amount. A promise to pay such a sum as A shall name, becomes a promise to pay the sum named by A as soon as it is named by him. A promise to abide by an award, becomes in effect a promise to pay the amount awarded as soon as the award is made. And so a stipulation in a treaty to make satisfaction for injuries which shall be judicially established, becomes a stipulation to pay the amount of the judgment as soon as it is duly rendered. The only difference, therefore, between the case supposed and the case now before us, is one of time, which in no way affects the principle which I am now considering.

Some stress has been laid on the circumstance that in the act of 1847 the judge is called a commissioner.—(9 Stat. at L., chap. xx, § 6, p. 130.) Upon this point I have but two remarks to make: (1) that it was not competent for Congress, in the year 1847, by an act declaratory of the meaning of the act of 1834, to affect vested rights; and (2) that Congress did not mean to make any such declaration, for the object of the act of 1847, as regards this subject, was not to declare whether the judge acted as a commissioner, or in his judicial character under the act of 1834, but merely to transfer the unfinished business under that act to the judge of the district court of Florida.

It is not at all questioned that the evidence in this case abundantly shows that it was within the jurisdiction of the judge who decided it; that the decision in it was rendered by the judge by whom it purports to have been rendered; and that the injury complained of was occasioned in the years 1812 and 1813, to the petitioner's intestate, who was at that time a Spanish subject, by the troops of the United States in East Florida, before the entrance into that province of the agent and troops of the United States. The decision of the judge, therefore, is just and equitable, within the provisions of the treaty of 1819, and the United States are bound by the faith of treaties, by the laws enacted by Congress to carry the treaty of 1819 into effect, and by the principles of that great moral code which has come down to us from on High, and which neither individuals, nor nations, can ever disregard with impunity, to satisfy it to the uttermost farthing.

My opinion, therefore, is, that the petitioner is entitled to relief.

NOTE.

The following are the translations referred to in the opinion of SCARBURGH, J.:

1. TRANSLATION FURNISHED BY THE SOLICITOR.

Extract from the treaty with Spain of 1819:

Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Espanñoles justifiquen legalmente haber sufrido por las operaciones del Exercito Americano en ellas.

[Translation.]

And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may or shall judicially prove, according to law, that they have suffered (literally to have suffered) by the operations of the American army in them (the Floridas.)

NOTES.—The words *si los hubiese habido* are about as literally translated, I think, by "if any there should have been," as they could be, preserving their plain meaning at the same time.

I understand the word *Españoles* to apply as well to *habitantes* as to *oficiales*. It seems to have been so understood by the negotiators of the treaty, and the arrangement of the words favors that idea, I think. *Oficiales Españoles* means Spanish officers, not officers of Spain; and in this case there might be a difference as well as a distinction. If the word was España, instead of Españoles, then it would not refer to *habitantes* without changing the phraseology of the sentence.

The words *justifiquen legalmente* are accurately translated, in my opinion, by "may judicially prove, according to law." *Justificar-justum facere* is a verb that has a good many meanings. When it is used as a law term, as it is in this clause of the treaty, it signifies *that*, or something equivalent. The translation might be varied, and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente*. Escriche says, in his Spanish Law Dictionary, that the word *justificacion* means the proving of something by documents or witnesses; and justificar means, in Spanish law, to produce judicially written or oral proof of a thing.

2. TRANSLATION FURNISHED BY THE COUNSEL FOR THE PETITIONER

Y los Estados Unidos satisfarán los perjuicios, si los hubiese
And the United States will satisfy the injuries, if them there have
habido, que los habitantes y oficiales Españoles justifiquen*
been, which the inhabitants and officers of Spain may judicially prove
legalmente haber sufrido por las operaciones del Exercito
according to law to have suffered by the operations of the [2]army
Americano en ellas.
[1]American in them, (the Floridas.)

NOTE.—This translation is made word for word, as being more satisfactory.

* Justifiquen is translated "may *judicially prove.*" It is the subjunctive present of the verb *justificar.* This verb is translated into Latin by the Spanish Academy, "*in jure, judicio, probare,*" and is explained, in Spanish, by the same Academy, as follows:

"Probar judicialmente alguna cosa."
To prove judicially any thing.
(See Dictionary of Spanish Academy, verb JUSTIFICAR.)

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 46.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES THOMPSON *vs.* THE UNITED STATES.

1. The petition of the claimant and amendment.
2. Claimant's brief on preliminary question.
3. Claimant's brief on the facts.
4. Statutes and evidence referred to by claimant's counsel.
5. Solicitor's brief on the facts.
6. Documents from Post Office Department exhibited as evidence transmitted to House of Representatives.
7. Depositions on behalf of claimant transmitted to the House of Representatives.
8. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

JAMES THOMPSON *vs.* THE UNITED STATES. } *Petition.*

The petition of James Thompson, of Louisville, Kentucky, surviving partner of the late Charles M. Strader, deceased, respectfully represents: That in September, 1837, the said Charles M. Strader,

on behalf of himself and your petitioner, doing business under the firm of C. M. Strader & Co., together with one Edward P. Johnson, entered into a contract with the Post Office Department to transport the mails of the United States in steamboats, on route No. 3330, from Louisville to New Orleans, with a branch mail to St. Louis, connecting at the mouth of the Ohio. That said transportation and service were to commence on the first day of January, 1838, and continue until the thirtieth day of June, 1842—a period of four years and six months—for the annual compensation of one hundred and eighty thousand dollars, viz: $160,000 for the route from Louisville to New Orleans, and $20,000 for the branch to St. Louis, payable quarterly in equal sums of $45,000 in the months of August, November, February and May. That for such compensation said contractors were to transport the said mails on said route and branch route three times a week, and deliver the same at the post offices in Louisville, in New Orleans, and in St. Louis, and upon the river bank at the landings, to agents of the Post Office Department, as the Postmaster General should direct.

That on and after the 1st of January, 1839, for the same compensation, said contractors were to transport the said mails daily over the said route and branch route, and deliver the same as aforesaid.

That a room for the mails was to be furnished in each boat in which they were to be put, and kept under lock and key; that the contractors were to be answerable for the persons to whom they should commit the care and transportation of the mail, and be accountable for any damages which might be sustained through their unfaithfulness or want of care; and, generally, to guarantee against all hazard the regular and safe delivery of the mails at the appointed times, and at the designated post offices and landings. That the Postmaster General might discontinue *the whole* service (but not a part) whenever he should consider it necessary to do so, he allowing one month's extra pay to the contractors; and the contractors were allowed to omit four trips a week, [*i. e.* of the 7 daily trips,] from the middle of July to the middle of November, at a pro rata deduction of pay. That the said contractors, with two sureties satisfactory to the Postmaster General, entered into bonds in the sum of $360,000, for the faithful performance of said contract; and, on the first day of January, 1838, they entered upon the said service and transportation of said mails on said route and branch route, and continued so to do until the Postmaster General, on the 20th of March 1838, in violation of the letter and spirit of the contract aforesaid, ordered a discontinuance of the branch mail from the 1st of April then next, and a reduction of pay to the amount of $20,000 per annum. That afterwards, viz: on the 18th of May, 1838, in violation of the letter and spirit of the contract aforesaid, the Postmaster General "ordered" that the daily service which was contracted to be rendered from and after January 1, 1839, should not commence until the 4th of November, 1839; that the contractors should convey the mails at their own expense to and from the landings to the post offices; that they should convey on all their boats, as may be required, an agent of the department, and furnish such agents with board, and a secure and convenient apartment exclusively

for their accommodation, and that of the mails; that the contractors should run good steam packet-boats in addition to their regular line, two or three times a week, as may be required by the department, between New Orleans and St. Francisville, and also between Vicksburg and Natchez, without any additional compensation until the 4th of November, 1839; and from that time at an additional allowance of $10,000 per annum for the packet service, carrying the mails from the landings to the post offices, and for board and accommodation of agents. And the Postmaster General ordered a reduction of $60,000 per annum from the annual compensation to be made, to take effect (not when the diminished service commenced, 1st January, 1839, but) on the 4th of August, 1838; and that such reduction continue until the 4th of August 1839, *when the daily service and the full pay of* $160,000 was to commence.

To all which orders and diminution of pay (in order to secure the full pay of $160,000 per annum, from the 4th August, 1839, renewedly promised by the Postmaster General,) the contractors reluctantly consented, and went on, as before, faithfully on their part, to execute and perform their said contract.

That afterwards, viz: on the 30th October, 1839, shortly before the contractors were to commence the receipt of the promised pay of $160,000 per annum, in violation of the letter and spirit of the said contract, and the further promise made, as aforesaid, by the Postmaster General, on the 18th of May, 1838, the Postmaster General—

"Ordered, that the service on said rivers, from and after the 4th of November next, when by contract it was to be daily, be reduced to three times a week, the mail agents and steam packet service between Natchez and Vicksburg to be dispensed with." "The packet service between New Orleans and St. Francisville to be retained as heretofore, and contractors to furnish all agents and carriers to secure the transportation of the mails between the several landings and post offices, in consideration of which reduction of service the annual compensation is to be reduced, from the said 4th day of November next, to $80,000; and the department retains the privilege, if it should think proper, to dispense with the packet service hereby retained, (and) to to deduct the further sum of $10,000 from the annual compensation."

The contractors, in full expectation that this would be the last interference on the part of the Postmaster General, and that, from November 4, 1839, to June 30, 1842, they would be allowed an annual compensation for transporting the mails tri-weekly from Louisville to New Orleans, of not less than $70,000 per annum, reluctantly consented, and went on, as before, faithfully, on their part, to execute and perform their said contract.

That afterwards, whilst the contractors were in the faithful performance of their contract, viz: on the 6th of February, 1841, without the consent of the contractors, and in violation of the letter and spirit of the contract aforesaid, and the further promises made by the Postmaster General, on the 18th of May, 1838, and the 30th October, 1839, the Postmaster General "ordered, that one weekly trip be taken off at $23,333 per annum deduction" of the yearly compensation. For the truth of all which your petitioner appeals to the contract and re-

cords on file at the office of the Postmaster General, (to which, for greater certainty, he refers,) a copy [believed to be a true copy,] of which is hereunto annexed.

Your petitioner further represents, that whilst the contractors were faithfully performing their contract, viz: in the year 1841, the Postmaster General determined to restore the third trip per week which had been discontinued, and, from the 1st January to the 3d of June, 1842, the Postmaster General directed a third mail per week to be sent by casual boats, under special contracts to be made in each case, relying upon the contractors, by their agents, to transfer the mails to and from such casual boats to the post offices; and he refused to permit such third trip to be performed by the contractors, and withheld all compensation for such service from the contractors.

Afterwards, however, the Postmaster General offered some partial compensation for the service of their agents in carrying the mails from such casual boats to and from the post offices, in settlement of all claims, which the contractors, of course, refused to receive.

Your petitioner further says, that the contractors aforesaid, on their part, were ready, prepared, willing, and desirous at all times to render and perform the service which they contracted to perform, according to the true and legal intent of the contract made the 24th of July, 1837, and executed on the 16th day of September, 1837, aforesaid; and were also ready and willing to perform the said service in the manner specified in the said orders of May 18, 1838, and October 30, 1839, and were faithfully performing the same, except when hindered and arrested by the "orders" of the Postmaster General above stated. But the Postmaster General failed on his part to perform his part of the contract, and refused to pay to the said contractors the compensation agreed to be paid by him in the original contract of 1837; and he failed to perform and pay the compensation promised on the order of May 18, 1838; and he failed to perform and pay the compensation promised on the order of October, 1839, to the very great damage and detriment of said contractors; and for which your petitioner claims the full amount of $408,686 69—a statement of which is hereunto annexed—besides interest on the same from the time the money was due and unpaid.

Your petitioner further says, that the modifications of the contract which were made on the 20th March, 1838, discontinuing the branch mail to St. Louis, and at a reduction of pay to the amount of $20,000 per annum; and the order of May 18, 1838, making a further reduction of pay to the amount of $60,000 per annum; and the further modification of October 30, 1839, were not made at the request of the contractors nor for their benefit. They were "*ordered*" by the department without regard to the legal rights or wishes of the contractors, and in violation of their legal rights, and *were reluctantly assented to, and consented to by the contractors because they were ordered* by the *department*, and with the hope that the department would not further trample upon and violate the legal rights of the contractors, as before stated; and the act of the department of the 6th February, 1841, reducing their annual pay from $180,000 per annum, originally con-

tracted to be paid, to $46,666⅔ per annum, was never consented to on the part of the said contractors.

Your petitioner further represents, that the late Charles M. Strader, while living, urged upon the successor of Postmaster General Wickliffe, continually, but without avail, for a settlement of this claim, and it was not until September 1852, that the department declined paying for the arrears of compensation claimed by the contractors, for an alleged want of authority.

Under these circumstances, your petitioner memorialized Congress at its 33d session, and his memorial was on the 5th of January, 1853, in the Senate, referred to the Committee on Post Offices and Post Roads.

On the 22d July, 1854, the memorial of your petitioner was again referred by the Senate to the Committee on Post Offices and Post Roads, which committee, by Mr. Adams, July 31, 1854, reported a "Joint resolution for the settlement of the claim of the late firm of C. M. Strader & Company, mail contractors," which resolution passed the Senate December 22, 1854.

In the House of Representatives the petition was, January 11, 1854, referred to the Committee on Post Offices and Post Roads, and on the 3d March, 1855, your petitioner's memorial was by the House referred to the Court of Claims.

Your petitioner further represents to this honorable Court, that no part of the claim set forth herein has been alienated by assignment or operation of law; and that your petitioner, and the widow and children of Charles M. Strader, deceased, are the owners thereof.

Wherefore your petitioner prays this honorable Court to take into consideration your petitioner's case, and grant relief by such a decision and bill in favor of your petitioner as in the judgment of this honorable Court may be necessary and proper, in order that the money, equitably and legally due from the United States, upon the contract set forth in this petition, may be paid to your petitioner, for the benefit of himself, as surviving partner, and the widow and four infant children of Charles M. Strader, deceased; and, as in duty bound, will ever pray.

JAMES THOMPSON,
For himself, and as surviving partner of
CHARLES M. STRADER, *deceased.*

CHAS. E. SHERMAN,
JOHN ELY,
Counsel for Claimant.

STATE OF KENTUCKY, }
City of Louisville, } *ss.*

Personally appeared before me, this 30th day of November, 1855, James Thompson, well known to me to be the person named in the petition, who, having been by me first duly sworn, deposeth and saith, that the facts stated in the foregoing petition, by him subscribed, are true to the best of his knowledge and belief.

GEORGE M. JOHNSTON,
[SEAL OF COURT.] *Judge City Court, Louisville, Kentucky.*

JAMES THOMPSON
vs.
THE UNITED STATES. } *Statement of account.*

The United States in account with James Thompson, surviving partner of the late Charles M. Strader, for transportation of the mail under contract No. 3330.

DR.				CR.
1842. June 30.	To transportation, 4½ years, at $180,000 per annum.....	$810,000 00	By this amount, received at different times during the 4½ years.....	$401,313 31
		810,000 00		
	To balance bro't down on contract 3330, unpaid, is.....	408,686 69	Balance.....	408,686 69
				810,000 00

APPENDIX.

Steamboat mail.

No. 3330. $180,000 *per annum.*

This indenture of contract, made the twenty-fourth day of July, in the year one thousand eight hundred and thirty-seven, between Charles M. Strader and Edward P. Johnson, of Louisville, Kentucky, contractors for carrying the mails of the United States, of the one part, and the United States of America, of the other part, witnesseth: That the said parties have mutually covenanted as follows:

That the said contractors covenant with the said United States of America:

1st. To carry the mails of the United States from Louisville, Kentucky, by Shawneetown, Illinois, Paducah, Kentucky, mouth of Ohio, Columbus, Mill's Point, Memphis, Tennessee, Helena, Arkansas, Columbia, Princeton, Mississippi, Vicksburg, Grand Gulf, Natchez, St. Francisville, Louisiana, and Donaldsonville, to New Orleans and back, tri-weekly, for the first year, and daily for the residue of the term, with a branch mail to St. Louis, Missouri, three times a week for the first year, and daily the residue of the time, as aforesaid, *all in steamboats.* All other offices on the route, and on the branch route, to be supplied with the mail, as the department may hereafter direct, at the rate of forty-five thousand dollars, for every quarter of a year, during the continuance of this contract; to be paid by postmasters on the route, and branch route, above mentioned, or in funds which may be, now or hereafter, on deposit in the Northern Bank of Kentucky, the Commercial Bank of Cincinnati, and its agency at St. Louis, and in any banks in the cities of New York, Philadelphia, or New Orleans, in good credit among banks, or otherwise, at the option of the Postmaster General, in the months of August, November, February, and May.

2d. That the mails are to be taken from, and delivered into the

offices at the ends of the route, and branch route; and taken from, and delivered to, the carriers of the office, for each intermediate post office on, or near, the bank of the river. But two hours' detention is allowed for each intermediate point.

3d. That a room for the mails is to be provided in each boat, in which they shall be put, and kept under lock and key. The boat will be required to make the utmost practicable despatch, and to run through in the time specified in the schedule attached to the contract.

4th. That the captain, or clerk, will be allowed a mail key, after being duly sworn, for the purpose of transferring mail packages from one bag to another, and placing way-letters in mail bags, the better to facilitate and ensure their delivery to their proper office.

5th. That if the contractors shall run on this route, or branch route, a boat, or other vessel, more rapidly than they are required by their contract to carry the mail, they shall give the same increased celerity to the mail, and without increase of compensation.

6th. That they shall not, by themselves or agent, transmit, or be concerned in transmitting, commercial intelligence more rapidly than by mail.

7th. That the contractors will, if required by the Postmaster General, faithfully render an account of all moneys received by them on account of the Post Office Department, and will pay over to the General Post Office all balances remaining in their hands.

8th. That in every case of failure to perform the trip, whatever may be the cause, there may be a forfeiture of the pay for the trip; and a failure to arrive at a post office by the time set in the schedule shall be considered as equal to a whole trip lost; which forfeiture may be increased into a penalty of ten times that amount, according to the circumstances under which the failure occurred.

9th. That the contractor shall be subject, for failure to take or deliver a mail, or any part of a mail; for suffering the mail to be injured, lost, or destroyed, or for negligently suffering it to be wet, to a penalty of twenty dollars, which may be increased to one hundred dollars, according to the size and importance of the mail and the circumstances under which the failure occurred.

10th. That the contractors shall be answerable for the persons to whom they shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care; and that they will discharge any agent or clerk having charge of said mail, whenever required to do so by the Postmaster General.

11th. That the Postmaster General may alter the times of arrival and departure fixed by the schedule, but not so as to increase the expedition.

12th. That the Postmaster General may discontinue the service whenever he shall consider it necessary to do so, he allowing one month's extra pay to the contractors.

13th. That the Postmaster General may annul the contract for repeated failures of the contractors to perform any of the stipulations of the contract; for violating the post office law or disobeying the

instructions of the department; or for assigning this contract without the consent of the Postmaster General first obtained.

14th. The said United States covenants with the said contractors to pay, as aforesaid, at the rate aforementioned, quarterly, in the months of August, November, February, and May.

The contractors are allowed to omit four trips a week, from the middle of July to the middle of November in each year, at a pro rata reduction of pay after the first year; and $20,000 per annum is the portion of the above pay allotted to the St. Louis branch.

Provided always, That this contract shall be null and void in case the contractors, or any person that may become interested in this contract, directly or indirectly, shall become a postmaster or an assistant postmaster. No member of Congress shall be admitted to any share or part of this contract or agreement, or any benefit to arise therefrom; and this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts." And it is mutually covenanted and agreed, by the said parties, that this contract shall commence on the first day of January, 1838, and continue in force until the thirtieth day of June, inclusive, which will be in the year one thousand eight hundred and forty-two; to commence earlier than first of January next, if practicable, at the above rates of compensation.

In witness whereof, the contractors and the Postmaster General have hereunto set their hands and seals, on the day set opposite their names.

AMOS KENDALL, [SEAL.]

OCTOBER 3, 1837.

Signed, sealed, and delivered, in the presence of—

SCHEDULE—*Subject to alteration by the Postmaster General, agreeably to the provision contained in the* 11*th section of this contract.*

Leave Louisville every Sunday, Tuesday, and Thursday, say at 10 a. m.

Arrive at New Orleans in eight days after, by 10 a. m.

Leave New Orleans every Sunday, Tuesday, and Thursday, say at 10 a. m.

Arrive at Louisville in twelve days after, by 10 a. m.

After the first year to run in one day's less time each way, and sooner if practicable.

The branch mail to be delivered at St. Louis in three and a half days from Louisville, and at Louisville in same time from St. Louis, and perfect connexions to be kept with the New Orleans mail at the mouth of the Ohio river.

COURT OF CLAIMS.—No. 412.

JAMES THOMPSON *vs.* THE UNITED STATES.

Amendment of petition.

Your petitioner further shows that Congress passed a joint resolution for the settlement of a portion of this claim, viz: for so much as was in consequence of the order of the Postmaster General, dated 6th of February, 1841; that said resolution was approved August 18, 1856, and under it there has been paid to James Thompson, surviving partner and administrator, and Mary B. Strader, widow and administratrix of the said Charles M. Strader, deceased, the sum of $24,509 23; to all of which the contractors were entitled in consequence of the reduction of their pay under the aforesaid order of the 6th of February, 1841.

And your petitioner further shows that the parties interested in this claim are the late firm of C. M. Strader & Co. and Edward P. Johnson, and that yonr petitioner is the surviving partner and administrator, and Mary B. Strader is the widow and administratrix of the said Charles M. Strader, deceased.

JAMES THOMPSON,
By his attorney, JOHN ELY.

IN COURT OF CLAIMS.

JAMES THOMPSON *vs.* THE UNITED STATES.

Brief on the preliminary question.

In behalf of the petitioner it will be contended, upon the facts set forth in the petition, as follows, viz:

1. That a contract in writing was entered into between Charles M. Strader and Edward P. Johnson, on the one part, and the United States, on the other, to provide for the transportation of the United States mails, in steamboats, over the route No. 3330, from Louisville to New Orleans, with a branch mail to St. Louis.—(See contract annexed to petition.)

Reference will be made to the statutes generally which provide for the transportation of the mails, and especially to

Act of March 3, 1823, section 3, 3 Statutes at Large, 767;
Act of March 3, 1825, section 1, 4 Statutes at Large, 102;
Act of March 3, 1825, section 10, 4 Statutes at Large, 104;
Act of July 2, 1836, section 23, 5 Statutes at Large, 85;
Act of July 2, 1836, section 27, 5 Statutes at Large, 86;
Act of July 2, 1836, section 29, 5 Statutes at Large, 87;
Act of July 2, 1836, section 13, 5 Statutes at Large, 82.

2. That, according to the true intent and meaning of the contract

the contractors entered upon the service on or before the 1st of January, 1838, and continued to transport the United States mails over the route from Louisville to New Orleans until the 30th June, 1842, when the service terminated by the terms of the contract.

3. That, in order to relieve the embarrassments of the department, the Postmaster General, arbitrarily, without authority of law, and in violation of the contract, *ordered certain reductions of the service, and also of the compensation contracted for*, intending thereby to reduce the annual compensation, payable to said contractors, from $180,000 to $46,666.—(See copies of the orders of the department, hereunto annexed.)

The Postmaster General is a ministerial officer. He is bound by the law.—(United States *vs.* Lyman, 1 Mason, 504; Tracy & Balistier *vs.* Swartwout, 4 Peters, 95.

Whenever the statute prescribes the manner in which an official act is to be done, that act, to be valid, must be done in the prescribed manner.—(Day *vs.* Wilber, 2 Cain's R., 134; United States *vs.* Slade, 2 Mason, 75; Thompson *vs.* Greely, 10 Howard, 225; United States *vs.* Three bales of cloth, 3 Hunt's Merchants' Magazine, 527.)

4. That *certain orders of the Postmaster General*, viz: the orders of March 20 and May 18, 1838, and October 30, 1839, were in violation of the contractors' legal rights under their contract, and were also in violation of the 23d section of the act of July 2, 1836; and the contractors' consent to the same was caused, on the one part, by an arbitrary and illegal order, and given, on the other part, reluctantly, and in consequence of that illegality; which order the contractors had no legal means of resisting.—(Maxwell *vs.* Griswold, 10 Howard, 255.)

5. That the consideration, or promises of the Postmaster General, on which the consent of the contractors was reluctantly given, failed, the said promises not having been kept by him. The promise, in the *order of May* 18, that the reduction of $60,000 from the annual compensation should only "continue until the 4th November, 1839, when the daily service is to commence," &c., was violated by the *order of October* 30, 1839, whereby a further reduction of $20,000 from the annual compensation was made, with a full understanding that no further reduction would be made; which understanding was violated by the *order of February* 6, 1841, which last order was not consented to by the contractors.

The consideration having failed on which the contractors gave a reluctant consent, such consent was no longer binding upon them. They were released therefrom by the acts of the department.

6. That the *order of February* 6, 1841, which reduced the pay to $46,666 per annum, was clearly in violation of the statute and the contract, as well as in violation of the promises contained in the prior orders of May 18 and October 30, was never consented to by the contractors, and was not binding upon them. The orders of the Postmaster General could not change the law, or affect the rights of the contractors.—(Elliot *vs.* Swartwout, 10 Peters, 153.)

7. That, by the orders of May 18 and October 30, the contractors were required "to run good steam-packet boats" in addition to their

regular line, two or three times a week, between New Orleans and St. Francisville, and between Vicksburg and Natchez. * * *

"Also that they convey the mail between the steamboats and the post offices." "Also that, whenever required, they convey on any or all of their boats agents of the department, and furnish them convenient apartments exclusively for their accommodation;" "*all without charge;*" and contractors having done as ordered, are entitled to be paid a reasonable compensation for such additional service.

8. That the contractors having been at all times ready and desirous to perform the full service contracted for, and having faithfully performed the said service, *except when hindered from doing so by the orders of the department*, are entitled to be paid therefor according to contract.

9. That the United States has not paid, but has refused to pay, the contractors for transporting the mails according to contract, and has not paid a reasonable *compensation* for the additional services performed in obedience to the orders of the department, and still refuses to pay for such services and additional services, to the great detriment and damage of the contractors; wherefore, upon the facts set forth in the petition, the petitioner prays for relief and redress, and that the Court do grant him an order for the taking of testimony.

CHARLES E. SHERMAN,
JOHN ELY,
Attorneys for Petitioner.

Know all men by these presents, that we, Charles M. Strader and Edward P. Johnson, as principals, and John B. Bland and Jacob Strader, as sureties, are held and firmly bound unto the United States of America in the just and full sum of three hundred and sixty thousand dollars, value received, to be paid unto the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the day and year set opposite our names.

The condition of this obligation is such, that whereas the above bounden Charles M. Strader and Edward P. Johnson, by a certain indenture of contract, executed on an even date herewith, covenanted with the said United States to carry the mail of the United States from Louisville, Kentucky, to New Orleans, Louisiana, with a branch mail to St. Louis, Missouri, as per said contract, commencing on the 1st day of January, 1838, and ending the 30th day of June, 1842, service to commence as much earlier as practicable, at the same rate of compensation. Now, if the said Charles M. Strader and Edward P. Johnson shall well and truly perform the covenants in the said indenture expressed on their part to be performed, and shall account for all penalties, and shall promptly repay all balances that may at any

time be found due from them, then this bond is to be void, otherwise to remain in full force.

C. M. STRADER, [L. S.]
E. P. JOHNSON, [L. S.]
J. B. BLAND, [L. S.]
JACOB STRADER. [L. S.]

Signed, sealed and delivered in presence of—
JAMES H. MARR,
H. M. MOORE,
JAMES GORMAN.
September 16, 1837.

The orders by the Post Office Department are believed to be as follows: (For greater certainty, see the original orders on file in the department.)

"March 20, 1838.—Ordered discontinuance of the branch mail from the 1st of April next, at $20,000 reduction per annum, the amount fixed in the contract for that branch."

"May 18, 1838.—Ordered that the service on steamboat route No. 3330, Louisville, Kentucky, to New Orleans, Louisiana, be reduced for the second year to three times a week, upon condition that the contractors run good steam-packet boats, in addition to their regular line, two or three times a week, as may be required by the department, between New Orleans and St. Francisville, Louisiana, and between Vicksburg and Natchez, Mississippi, supplying the way-offices, as directed; also, that they convey the mail between the steamboats and the post offices, whenever carriers may be necessary, at their own expense; also, that they convey on any and all of their boats, whenever, and as long as may be required, agents of the department, one for each boat, and furnish them secure and convenient apartments, exclusively for their accommodation and that of the mails, all without charge; and that a reduction of $60,000 be made from their annual compensation, to take effect on the 4th August, 1838, and continue until the 4th November, 1839, when the daily service is to commence. And from the commencement of the daily service, an additional allowance of $10,000 per annum will be made for the additional service by packet-boats, for carrying the mails to the intermediate offices, and for the board and accommodation of the agents, all as aforesaid; to cover, also, a similar arrangement on the St. Louis branch, if service on the same shall be revived by order of the department."

We agree to the conditions and all of the above order.

STRADER & JOHNSON,
By C. M. STRADER.

May 18, 1838.

June 5, 1838.—Contractors directed to supply Quincy once a week, ascending and descending the river.

February 6, 1837.—Ordered that contractors on this line be required to put on land supply on route No. 4035, twice a week, at their own cost, and without delay, unless the supply by steamboat can be made more certain.

March 14, 1839.—Ordered that the contractors be permitted to supply three times a week in stages, in lieu of the packet steamboat supply, to the following offices: St. Francisville, Att. Willing, Baton Rouge, Mamm. Aberville, New River, Donaldsonville, Brinquin. Carn, Lafayette to New Orleans, Providence, St. Francisville; to be supplied by steamboat also on the descending trips.

1839, October 30.—In consideration that the condition of the country does not at present require daily mail service on the Ohio and Mississippi rivers, and the state of the currency is such as to render uncertain the means of the department to sustain it; and, inasmuch as it has been found impracticable to supply the small offices on the banks of the rivers with any certainty or regularity, it is ordered that the service on said rivers, from and after the 4th of November next, when the contract was to be daily, be reduced to three times a week; the mail agents and steam-packet service, between Natchez and Vicksburg, to be dispensed with, and the offices on the route, except Louisville, Kentucky; Evansville, Indiana; Shawneetown, Illinois; Smithland, Paducah, Kentucky; mouth of Ohio, Illinois; Mills' Point, Kentucky; New Madison, Missouri; Memphis, Tennessee; Helena, White River, Napoleon, and Columbia, Arkansas; Vicksburg, Grand Gulf, and Natchez, Mississippi; St. Francisville, Donaldsonville, and New Orleans, Louisiana; each office retained to be supplied three times a week, ascending and descending; and the packet service, between New Orleans and St. Francisville, to be retained as heretofore; and contractors to furnish all agents and carriers, to secure the transportation of the mails between the several landings and post offices; in consideration of which reduction of service the annual compensation is to be reduced from the said 4th day of November next, to eighty thousand dollars, ($80,000.)

And the department retains the privilege, if it should think proper, to dispense with the packet service hereby retained, and to deduct the further sum of ten thousand dollars ($10,000) from the annual compensation.

The contractors assent to the above order.

(Date of Postmaster General's order, 27th October, 1839.)

1840, July 29.—Contractors directed to carry mails from New Orleans and Donaldsonville, in boats that run between New Orleans and Louisville three times a week, as well as twice-a-week boats between New Orleans and Bayou Sarah.

1841, February 6.—Ordered that one weekly trip be taken off at $23,333 per annum deduction.

1841, March 1.—Postmaster at Louisville reports that contractors took off the 15th the trip to be omitted by the Postmaster General's decision of the 6th February, 1841.

1841, March 16.—Ordered so to change schedule as to leave out the Tuesdays' trips from each end of the route.

1841, May 19.—Contractors to be entitled to be paid for tri-weekly service to the 18th February, 1841, instead of the 15th; and to half pay for the third weekly trip, (ordered to be discontinued,) from that date to the 31st March, 1841.

1841, June 16.—No. 3330, part between New Orleans and St.

Francisville. Following schedule ordered for the packet service. (Here follows schedule, omitted.)

1842, July 21.—Ordered to allow one month's extra pay on order of February 6, 1841, viz: one-twelfth of $23,333.

COURT OF CLAIMS.—412.

JAMES THOMPSON, surviving partner, &c., *vs.* THE UNITED STATES. } Brief of points and authorities.

Reference will be made to the laws which govern the Post Office Department, and especially to those that provide for the transportation of the mails, viz:

Act of	3d	March,	1823,	sec.	3,	3	Statutes at	Large,	767;
"	3	"	1825,	"	1,	4	"	"	102;
"	3	"	1825,	"	10,	4	"	"	104;
"	2	July,	1836,	"	23,	5	"	"	85;
"	2	"	"	"	27,	5	"	"	86;
"	2	"	"	"	29,	5	"	"	87;
"	2	"	"	"	31,	5	"	"	82.

In behalf of the petitioner it will be contended, upon the facts set forth in the petition, and upon the evidence as follows, viz:

I.—1st. That a contract in writing was entered into between Charles M. Strader and Edward P. Johnson, on the one part, and the United States on the other, to provide for the transportation of the United States mails in steamboats, over the route No. 3330, from Louisville to New Orleans, with a branch mail to St. Louis.—(See contracts annexed to the petition.)

2d. That the mails were to be transported three times a week, each way, during the year 1838; and from January 1, 1839, to June 30, 1842, daily, each way, over said route and branch route, and contractors were to receive and deliver the mails at the post offices in Louisville, New Orleans and St. Louis; and for the intermediate post offices at the landings on the river bank, to agents of the Post Office Department.

3d. That in behalf of Strader and Johnson, contractors, C. M. Strader & Co. entered upon the service on or before the 1st January, 1838, and continued to perform the service as the contract required, until June 30, 1842, except when hindered or excused from doing so by the orders of the Post Office Department.

II.—That certain orders of the Postmaster General, dated March 20, May 18, October 30 and February 6, did not legally vary the contract, nor reduce the service, because those orders were arbitrary, without authority of law, in violation of the contract, and were not acquiesced in by the parties to the contract, and were without consideration, and void in law. Hasbrouch *vs.* S. Tappan, 15 Johns., 200, note A; 2 Parsons on Contracts, 180, note B; Hoyt *vs.* Bend, 13

Peters, 271, 272, 273; Blight's Exrs. *vs.* Ashley; Peters C. C. R., 15; Gibbons & Shelby *vs.* the United States, Court of Claims.

The Postmaster General is a ministerial officer. He is bound by the law—(United States *vs.* Lyman, 1 Mason, 504; Tracy and Balistier, *vs.* Swartwout, 4 Peters, 95.)

Whenever the statute prescribes the manner in which an official act is to be done, that act, to be valid, must be done in the prescribed manner.—(Day *vs.* Wilber, 2 Cain's R., 134; United States *vs.* Slade, 2 Mason, 75; Thompson *vs.* Greely, 10 Howard, 225; Magruder *vs.* The United States, Court of Claims; Bartlett *vs.* Crozier, 15 John. R., 254; Conrad *vs.* The Pacific Insurance Co., 6 Peters, 281; 2 Parsons on Con., 180; Allen *vs.* Jaquish, 21 Wend., 628; Dearborn *vs.* Crow, 7 Cow., 48; Delacroix *vs.* Buckley, 13 Wend., 74.)

III.—That the only legal basis on which a settlement can be predicated between the contractors and the United States is that provided by the statutes and the contract. These constitute the law of the case, and are to be construed as if embodied in one act, or in one contract.—(See the acts cited under the first point, and sections 1, 11, 12 and 14 of the contract.)

That the contract, and not the orders of the department, must be held to have fixed the compensation to be paid to the contractors.—(Com. Dig. Tit. Atty., C. 11, 15; Story on Agency, § 165, 170; Delafield *vs.* The State Bank of Illinois, 26 Wend, 255, cites Beals *vs.* Allen, 18 Johns. R., 363; Chitty on Con., 228; and 8 Johns. R., 253; Hasbrouck *vs.* Tappen, 15 Johns., 203; 2 Parsons on Contracts, 35; Delacroix *vs.* Buckley, 13 Wend., 74; United States *vs.* Lyman, 1 Mason, 504; Letter Hobby Note; Griswold *vs.* Maxwell, 10 Howard, 225; Durand *vs.* United States, Court of Claims; United States *vs.* Dickson, 15 Peters, 161, 162; Chitty on Con., 9 Am. Ed., 650 note; Elliott *vs.* Swartwout, 10 Peters, 153.)

IV.—That the services rendered by C. M. Strader & Co. must be held to have been, on the part of the contractors, a full performance of their contract, and to entitle them to receive the compensation stipulated for in the contract, because—

1st. They transported the entire mail matter, bulk and weight, upon the route from Louisville to New Orleans, as required by the contract, "three times a week for the first year," and continued the said service, under orders of the department, three times a week until February 18, 1841, when the orders of the department required them to discontinue one of the three trips per week.

2d. From February 18, 1841, until June 30, 1842, the termination of the contract, they transported over the said route all the mail matter that the orders of the department permitted.

3d. They performed, under orders of the department, an expensive packet service and supplied some eleven new post offices, between New Orleans and St. Francisville, (an extra service for some 4 years, which cost them about $12,000 per annum.)

4th. They transported the entire of the mails between the post offices and the steamboats for the whole time of the service under orders of the department (an extra service which cost them from $6,000 o $8,000 per annum.)

5th. They transported mail agents whenever required by orders of the department, (an extra service which cost them some $4,000 per annum.)

6th. They paid all fines and reductions imposed under sections 8 and 9 of the contract, amounting to $29,385.

7th. They obeyed all instructions of the department, and performed the service as required by the orders of the department.—(Blight's Exrs. *vs.* Ashley, Peters C. C., 15.)

8th. They were ready at all times, after 1st January, 1839, to have performed the service daily.

9th. Under the contract executed by the Postmaster General October 3, 1857, they performed, and the department accepted their services and extra services, as performed, in the place of the daily services contracted for.—(Gibbons & Shelby, *vs.* The United States, Court of Claims; Blight's Exrs. *vs.* Ashley, Peters C. C. R., 15; Hasbrough *vs.* Tappen, 15 Johns., 213; 2 Parsons on Con., 188; Ibid, 189.)

V.—That, by an agreement between Charles M. Strader and Edward P. Johnson, Charles M. Strader was to perform the service, and receive payment for the same.

That Charles M. Strader and James Thompson were partners, under the firm of C. M. Strader & Co., and performed the service.

That Charles M. Strader is dead, and James Thompson is administrator on his estate; and that James Thompson is surviving partner in his own right, and as administrator for the estate of Strader is entitled to receive the money due on the contract.

VI.—That for four and a half years' services, which has been rendered, the United States contracted to pay "at the rate of $45,000 for every quarter of a year," or the full sum of..... $810,000 00

And the United States has paid to C. M. Strader & Co., in cash, only the sum of	$374,122 51	
And has charged them fines, the sum of	12,195 00	
And has charged them reductions.....	17,190 00	
		404,507 51
As shown by their account rendered to this Court. Leaving due and unpaid for said service the sum of.....		405,492 49

Wherefore, the petitioner prays that this Court grant him a judgment for the sum of $405,492 49, which remains due and unpaid, for money expended and services rendered to and for the United States under the aforesaid contract.

JOHN ELY,
Attorney for Petitioner.

VII.—The contract was partly for the transportation of freight, but mainly for personal services and personal responsibility. The rule of damages affixed by law for the non-performance of a contract or promise to pay for work or materials, for goods, wares or merchandise, is not the same as for a breach of contract or promise to

pay, for personal service or transportation. In the former cases the actual loss, the difference between the value of the work and materials, the goods, wares or merchandise, and the price promised, is the rule or measure of damages; in the latter it is the contract price—the sum to be paid.

VIII.—The contractors having performed, on their part, in the manner required by the department and as far as its orders permitted, and having been at all times prepared, ready and willing to perform the service in the manner specified in their contract, are entitled under their contract (it being a contract under seal) to recover the full pay at the price therein stipulated, for the entire term of service for which they were hired to transport and did transport the United States mails, (deducting the several sums of money heretofore paid to them on account.)

IX.—If the defendant seeks to rebut such right to recover, and to reduce the damages below the sum contracted to be paid for the service, the defendants, the delinquent party, is bound to allege and prove that he is entitled to such reduction, and the precise sum which should be allowed to him; and the *onus probandi* of such defence lies with the delinquent party, to be certainly alleged and affirmatively proved by him.

Such are the well established rules and principles of justice and equity, as will appear by reference to the authorities, viz:

Pothier on Obligations, part 2, chap. 3, article 3, sec. 212, p. 121 of Evans' ed., 1806; Alder *vs.* Keigley, 15 Meeson & Welsby, 117, 120; Chitty on Con., 5th Am. ed., 575, 581; Chitty's Gen. Pr., 72, 73; Beeston *vs.* Collyer, 4 Bing., 309; Fawcett *vs.* Cash, 5 Barn. & Ald., 904; Williams *vs.* Byrne, 7 Ad. & El., 177; French *vs.* Brooks, 6 Bing., 354; Gandall *vs.* Pontignay, 4 Campb., 375; Robinson *vs.* Hindman, 3 Esp., 235; Smith *vs.* Kingsford, 3 Scott, 279; Smith *vs.* Hayward, 7 Ad. & El., 544; Clark *vs.* Marsiglia, 1 Denio, 317; Abbott on Ship, 4th Am. ed., 442, 443; Hoyt *vs.* Wildfire, 3 Johns., 518; Ward *vs.* Ames, 9 Id., 138; Emerson *vs.* Howland, 1 Mason, 51, 52; Abbott on Ship., 277, 278; Puller *vs.* Stamforth, 11 East., 232; Puller *vs.* Halliday, 12 Id., 494; Taylor *vs.* Reid, 4 Paige, 571; Keene, &c., libellants, *vs.* the brig Gloucester, &c., appellees, 2 Dallas, 36, 38; Marshall *vs.* Graig, 1 Bibb., 395; same case, 1 Bibb., 386; Brooks *vs.* Dorr, 2 Mass. R., 39; Gibbons et al *vs.* the United States, Court of Claims.

From the amount stated under our sixth point, there is to be deducted the sum paid under the joint resolution of August 18, 1856, viz: $24,509 23, which leaves a balance still due the contractors, of $380,983 26 and upwards.—(See statement by the Auditor.)

JOHN ELY,
Attorney for Petitioner.

IN THE COURT OF CLAIMS.—No. 412.

JOHNSON & STRADER
vs.
THE UNITED STATES.
} *Solicitor's Brief.*

This case is very plain, depending on a few simple facts. On the 24th of July, 1837, the plaintiffs entered into a contract to carry the mail in steamboats from Louisville to New Orleans, with a branch to St. Louis, at the sum of $180,000 per annum—the Postmaster General having the right to discontinue the service. The price allowed for the St. Louis branch to be $20,000. The service commenced the 4th of November, 1836, (see account rendered by the Post Office Department,) at the rate of $180,000. Soon after the service commenced, at the request of the contractors, the St. Louis branch was discontinued, (see deposition of W. H. Dundas, at page 2,) which reduced the compensation to $160,000 per annum. He, (Dundas,) at same page, also proves, that on application of the contractors an order was entered, May 18, 1838, reducing the service for the second year from daily to tri-weekly, and deducting $60,000 from the pay, which reduced the pay from $160,000 for daily service to $100,000 for tri-weekly service. This, undoubtedly, was a favorable change to the contractors, and made at their instance, and service was performed by them under said order without complaint. There can be no question that this change was by agreement. Several orders seem to have been made, at different times, to remedy irregular service. On the 30th of October, 1839, an order was made dispensing with daily service for the residue of the contract, and with a portion of the other service, and reducing the compensation to $80,000. This order was assented to by the contractor. See deposition of Dundas, and also the endorsement of contractors on said order.

This change, we also think, was beneficial for the contractors, and doubtless made with their consent. The contractors have been paid in full according to the alterations in their contracts, and which were made at their own instance, or assented to by them.—(See account of the Post Office Department, marked A.) There might have been a question as to the right of the department to dispense with one of the three weekly trips, as was done under the order of the 6th of February, 1841; but under the resolution of Congress of the 18th of August, 1856, appended to the report of Mr. Phillips, (Auditor of the Post Office Department,) the plaintiffs have been paid in full for that. It will certainly not be gravely denied at this late period, that by agreement between the Post Office Department and a contractor, a contract may be changed.

DAN'L RATCLIFFE,
Ass't Solicitor of Court of Claims.

IN THE COURT OF CLAIMS.

JAMES THOMPSON *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

On the 16th day of September, A. D. 1837, Charles M. Strader, in behalf of himself and the petitioner, who were partners doing business under the firm of C. M. Strader & Co., together with Edward P. Johnson, entered into a contract with the United States to carry the mail in steamboats from Louisville to New Orleans and back, tri-weekly for the first year, and daily afterwards, with a branch mail to St. Louis three times a week for the first year, and daily afterwards, at the rate of forty-five thousand dollars for every quarter of a year during the continuance of the contract—the contract to commence on the 1st day of January, A. D. 1838, and continue to the 30th day of June, A. D. 1842, inclusive, and twenty thousand dollars *per annum* to be "the portion of the above pay allotted to the St. Louis branch." The contractors entered upon the service on the 1st day of January, A. D. 1838.

On the 20th day of March, A. D. 1838, the Postmaster General ordered a discontinuance of the branch mail from the first day of the succeeding April, and a reduction of $20,000 per annum from the pay.

On the 18th day of May, A.D. 1838, the Postmaster General made another order, directing material changes in the service, and a reduction of $60,000 from the annual compensation.

On the 30th day of October, A. D. 1839, the Postmaster General made another order, directing further material changes in the service, and a reduction of the annual compensation from the fourth day of the succeeding November, to eighty thousand dollars.

On the 6th day of February, A. D. 1841, the Postmaster General made another order, directing "that one weekly trip be taken off at $23,333 *per annum* deduction."

All these orders were duly carried into effect.

In relation to the orders of March 20, A. D. 1838, and May 18, A. D. 1838, the petitioner says: "To all which orders and diminution of pay, (in order to secure the full pay of $160,000 *per annum*, from the 4th August, 1839, renewedly promised by the Postmaster General,) the contractors reluctantly consented, and went on as before, faithfully, on their part, to execute and perform their said contract."

In relation to the order of October 30, A.D. 1839, the petitioner says: "The contractors, in full expectation that this would be the last interference on the part of the Postmaster General, and that, from November 4, 1839, to June 30, 1842, they would be allowed an annual compensation for transporting the mails tri-weekly from Louisville to New Orleans, of not less than $70,000 *per annum*, reluctantly consented, and went on as before, faithfully, on their part, to execute and perform their said contract."

The petitioner "further says, that the modifications of the contract which were made on the 20th March, 1838, discontinuing the branch

mail to St. Louis, and at a reduction of pay to the amount of $20,000 *per annum*, and the order of May 18, 1838, making a further reduction of pay to the amount of $60,000 *per annum*, and the further modification of October 30, 1839, were not made at the request of the contractors, nor for their benefit. They were '*ordered*' by the department without regard to the legal rights or wishes of the contractors, and in violation of their legal rights, and *were reluctantly assented to, and consented to, by the contractors, because they were ordered*, by the *department*, and with the hope that the department would not further trample upon and violate the legal rights of the contractors, as before stated, and the act of the department of the 6th February, 1841, reducing their annual pay from $180,000 *per annum*, originally contracted to be paid, to $46,666 66⅔ *per annum*, was never consented to on the part of the said contractors."

The petitioner also "further says, that the contractors aforesaid, on their part, were ready, prepared, willing, and desirous at all times to render and perform the service which they contracted to perform, according to the true and legal intent of the contract made the 24th of July, 1837, and executed on the 16th day of September, A. D. 1837, aforesaid, and were also ready and willing to perform the said service in the manner specified in the said orders of May 18, 1838, and October 30, 1839, and were faithfully performing the same, except when hindered and arrested by the 'orders' of the Postmaster General above stated. But the Postmaster General failed on his part to perform his part of the contract, and refused to pay to the said contractors the compensation agreed to be paid by him in the original contract of 1837, and he failed to perform and pay the compensation promised on the order of May 18, 1838, and he failed to perform and pay the compensation promised on the order of October, 1839, to the very great damage and detriment of said contractors, and for which your petitioners claim the full amount of $408,686 69—a statement of which is hereunto [to the petition] annexed—besides interest on the same from the time the money was due and unpaid."

This case was presented to the thirty-third Congress, and, by a resolution of the House of Representatives, adopted on the 3d day of March, A. D. 1855, referred to this Court. Since it has been pending here it was again submitted to Congress, and Congress, by a resolution approved August 18, A. D. 1856, directed that the accounts of the contractors be "audited and settled, and that the said contractors be allowed the amount to which they may be entitled in equity and justice for the discontinuance of that part of their aforesaid contract under the order of the Postmaster General, dated sixth of February, eighteen hundred and forty-one, as may appear by the records of the Post Office Department." * * * The accounts of the contractors have been settled accordingly, and the amount ascertained to be due them was $24,509 23. This sum has been paid to the proper parties, and no claim is now made on account of the last mentioned order of the Postmaster General. Since this payment, the petitioner has filed here a statement, in which, after giving credit for the above sum of $24,509 23, he claims a balance of $380,983 26 as still due.

All complaint against the order of February 6, A. D. 1841, has, it

is admitted, been satisfied. The claim now made rests entirely upon the other orders. Our inquiries, therefore, will be confined to the latter.

It appears, both from admissions made by the claimant in his petition and from the evidence, that these orders were made by the Postmaster General, with the consent of the contractors. The admissions are stated in the petition without any other qualification than that the consent was *reluctantly* given. The contractors, it is averred, "*reluctantly consented*" to the modifications of the original contract made by the orders. We understand this averment in effect to be that if the contractors had been left to themselves, uninfluenced by any suggestion from the Postmaster General, they would have preferred to have gone on with the contract in its original shape, but that they yielded their own preferences to his wishes. They did this reluctantly, but still they did it voluntarily. They consented to what the Postmaster General wished and authorized it. Their own inclinations were opposed to the changes which he desired, and hence arose their reluctance. But this, by the exercise of their own free will, they overcame, and instead of refusing, consented, to comply with his wishes, and agreed to and allowed the changes proposed by him. Such, we think, is the effect of the averments of the petition.

William H. Dundas, a witness examined by the petitioner, testifies directly that the order of March 20, A. D. 1838, was made at the request of the contractors, and that the order of May 18, A. D. 1838, was made on their written application, a copy of which is appended to his deposition. The petitioner has suggested that this witness did not testify from his own knowledge, but to what he gathered from the records of the Post Office Department, and that the order of May 18, A. D. 1838, does not direct the modifications applied for by the contractors. In the view which we have taken of the evidence in this case, we do not deem it necessary to consider what weight is due to this suggestion, or to make any decision in regard to it.

We have been furnished with a copy of all the orders made by the Postmaster General in reference to this case. Appended to the order of May 18, A. D. 1838, is a copy of a memorandum, as follows: "We agree to the conditions and stipulations of the above order. Strader & Johnson, per C. M. Strader." The petitioner has in writing objected to the admissibility of this copy as evidence that the memorandum was actually made by the contractors. We do not deem it necessary to decide this point.

The order of March 20, A. D. 1838, was certainly made. On the 3d day of May, A. D. 1838, the contractors made the application above mentioned for modifications of the original contract. No complaint was then made, or had previously been made, against the order of March 20, A. D. 1838. On the 18th day of May, 1838, the order of that date was made. I refer to the previous order of March 20, A. D. 1838, and to the branch mail as not then in operation. It is not important to compare this order with the previous application of the contractors. They conformed to the modifications directed by it. On the 30th day of October, A. D. 1839, the order of that date was made, and appended to it is this memorandum: "We assent to this

order and agree to comply with all its conditions." Signed "Strader & Johnson, per C. M. Strader." This memorandum it is conceded, was actually made as it purports to have been made. It is genuine.

In the order of May 18, A. D. 1838, a steam-packet service between New Orleans and St. Francisville, and a similar service between Vicksburg and Natchez, were provided for. In the order of October 30, A. D. 1839, the former was expressly retained, and the latter expressly dispensed with. No objection was then made, or had previously been made, to the order of May 18, A. D. 1838. The service had been regularly performed under the latter order up to the time of making the order of October 30, 1839, without the slightest complaint on the part of the contractors against either of the previous orders. By the last order the annual compensation was reduced to $80,000 from $100,000, to which it had been reduced by the previous order of May 18, A. D. 1838, and by the order of March 20, A. D. 1838, it had been reduced from the 1st day of April thereafter to $160,000. And, moreover, not only was the last order, that of October 30, A. D. 1839, which either expressly or by necessary implication refers to all the previous orders, made with the unqualified consent of the contractors, but they expressly agreed to "comply with all its conditions." If this were a case between man and man, there would be no room for doubt that the previous orders, as well as that of October 30, A. D. 1839, were made with the mutual consent of the parties. In this respect there is no difference between such a case and this case.

The petitioner insisted, in argument, that the consent of the contractors to the orders of the Postmaster General was given under constraint, not freely and voluntarily, but under moral duress; but this is neither averred in the petition, nor proved by the evidence.

The petitioner also insisted, in argument, that the Postmaster General, being merely a ministerial officer, was incompetent to bind the United States by making any changes in the original contract not authorized by law; that he could have lawfully made the changes directed by the orders under consideration only in the manner prescribed by the 23d section of the act of July, 2, A. D. 1836, (5 Stat. at L., p. 85, ch. 270, § 23;) that in making those orders, he did not follow that section; and, therefore, that the United States were not parties thereto, but that those orders were null and void, without legal force and effect, and bound no one. We do not deem it necessary to consider the construction of the 25th section of the act referred to, or the powers of the Postmaster General in the premises. It may be true that the orders above mentioned, considered as *contracts*, were null and void. Upon this point we give no opinion. But it is by no means a necessary consequence that they so excused the contractors from the performance of their part of the actual contract as to entitle them to the same compensation as if they had actually performed it, or that they constitute such a breach of the actual contract by the United States as to entitle the contractors to damages therefor, or that they constitute a breach of the actual contract by the United States in any sense. If they were mere nullities, and the contractors had treated them as such, and had held themselves ready and willing to perform their part of the actual contract, their attitude before this Court

would be very different from what it now is. But they did not treat them as nullities. On the contrary, they united with the Postmaster General in giving them validity, as far as they were capable of doing so, and it cannot be truly averred that the orders would have been made without their consent. If they were not authorized, but forbidden by law, the contractors, by consenting to and uniting in them, participated in all the illegality which attached to them. If they were breaches of the original contract, they were breaches in which the contractors, equally with the Postmaster General, took part. How, by uniting with the Postmaster General in an unlawful arrangement, and thereby reducing the services due by them to the United States to a very considerable extent, the contractors can, by reason of that very arrangement, after having availed themselves of it, and rendered and offered to render only the services required by it, be entitled to damages as for a breach of contract committed by the United States, is not perceived. To affirm that they can, is but to state a proposition which furnishes its own refutation. To show that the arrangement was forbidden by law cannot improve the condition of the contractors, or give validity to their claim. "*Nul prendra advantage de son tort demesne.*"—(2 Inst., 713.) Hence if they were sued, they might not, for that reason, be able to avail themselves of it as a defence to the action, but it cannot enable them to sustain an action brought by themselves. They have received compensation for the services actually performed by them, and they can, upon no principle known to the law, be entitled to more. They did not actually perform, nor were they ready and willing to perform, their part of the original contract; but they voluntarily did something else. Under such circumstances, the United States cannot be liable to them in damages as for a breach of contract.

If the orders made by the Postmaster General were not forbidden by law, but were within the sphere of his authority, then indubitably they were made by the mutual consent of the United States and the contractors, and *pro tanto* modified the original contract. It is not pretended that the original contract, as thus modified, has not been performed by the United States.

The petitioner, in his brief, insisted that Johnson was not bound by any admissions made by Strader; but at the hearing, he, by his counsel, admitted that Johnson was merely a nominal party to the original contract. It is not necessary, therefore, for us to consider this point.

We are of the opinion that the petitioner is not entitled to relief.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 47.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ROBERT C. THOMPSON AND ANOTHER

vs.

THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Solicitor's brief.
4. Opinion of the Court adverse to the claim.
5. Documents in this case referred by the House of Representatives to the Court of Claims, and returned to that House in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this seventh day of December, A. D. 1857.

[SEAL.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The petition of Robert C. Thompson, of Allegany, in the county of ———, in the State of Pennsylvania, begs leave respectfully to represent unto this honorable Court, that he is interested as administrator of William Thompson, deceased, in a claim which the said William Thompson had against the United States for services in the revolu-

tionary war. That his interest in said claim arises from the consideration that he is administrator and one of the heirs-at-law of the said William Thompson, and now gives up to Theressa Stem, administratrix of Catherine Thompson, widow of the General, who died on or about the third day of September, A. D. 1781, and in consideration of certain resolves of Congress hereinafter named. And your petitioner further represent that the said William Thompson was commissioned by Congress a brigadier general, A. D. 1776, in the continental service, in the revolutionary war, and served as such officer until his death as aforesaid; that by a resolution of Congress of the 24th day of August, 1780, it was provided that the resolution of the 15th of May, 1778, granting half pay for seven years' to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or should thereafter die in the service, to commence from the time of such officer's death and continue for the term of seven years; or if there should be no widow, or in case of her death or intermarriage, the said half pay should be given to the orphan children of the officer so dying as aforesaid, if he should have left any, &c. And your petitioner avers that the said William Thompson died when in the service, before the end of the war, and at the time above stated, leaving a wife and children him surviving, but who are now dead, leaving grandchildren.

And your petitioner further shows to this court that the seven years' half pay provided for in the foregoing resolution has never been paid, but remains as a debt or claim due to the estate or representatives of the said officer from the United States; that Congress acted on this claim in 1854, 1st session Congress, and favorably reported with bill in seven years' half pay and interest, from the Senate's committee, report No. 338, and the same was afterwards referred to the Court of Claims, which proceedings in Congress your petitioner prays may be made a part of this case, and the same filed in this court.

Your petitioner therefore prays that this honorable court will examine into the justice and equity of said claim, and report a bill to Congress for the payment thereof, with interest, unto the legal representatives of the said officer, or such other order or bill as shall seem fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

R. C. THOMPSON,
THERESSA STEM,
By their agent in fact, JOSEPH STOKELY.

Dated MAY 26, A. D. 1856.

STATE OF PENNSYLVANIA, }
County of Westmoreland, } *ss.*

Joseph Stokely, of,—— in the county of Westmoreland, in the State of Pennsylvania, being duly sworn, doth depose and say that the petition above by him subscribed contains the truth, according to the best of his knowledge, information, and belief.

JOSEPH STOKELY,
Agent for R. C. THOMPSON and
THERESSA STEM.

Sworn and subscribed before me, a judge of the court in the said county, this 26th day of May, A. D. 1856.

JAMES BELL.

IN THE COURT OF CLAIMS.

ROBERT C. THOMPSON, adm'r, &c., claimant, *vs.* THE UNITED STATES.	Claimant's brief and points.

1. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo & Moulton's "Pension and Bounty Lands," 3; resolution of August 24, 1780, ib. 6; resolution October 21, 1780, ib. 7; resolution March 22, 1783, §2, ib. 9; resolution March 8, 1785, ib. 10.) Ib., in the introduction, pages xxi, xlii.

2. The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson & Lieutenant Price's case, in October, for the relief of, March 2, 1833, Mayo & Moulton, 180. Lieutenant Wilson's case, act February 27, 1833, his heirs allowed seven years' half pay with interest, per resolution of Congress, August 24, 1780, ib. 175.)

Doctor Axson's case, act June 15, 1832; commutation with interest, ib. 163.

Captain McDuff's case, act April 2, 1830, section 2; land given him, the same as to other captains in the continental line, ib. 148.

Lieutenant Jacob's case, act July 14, 1832; commutation and interest allowed him; ib. 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832; commutation and interest allowed to heirs; ib. 168.

Colonel Thornton's case, act February 9, 1833; commutation and interest to administrators, one-fourth to widow, and residue distributed to persons entitled according to the laws of Virginia; ib. 173.

John Thomas and Peter Foster's cases, act March 2, 1833; commutation and interest as officers; ib. 178.

Richard Henley courts case, act March 2, 1833; commutation to his widow and interest; ib. 178.

Captain Triplit's case, act March 2, 1833; commutation and interest; ib. 179.

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.—No. 677.

ROBERT C. THOMPSON, administrator of WILLIAM THOMPSON, *vs.* THE UNITED STATES.

Brief of Solicitor.

The petitioner alleges that his intestate was a brigadier general, commissioned by Congress during the war of the revolution, and that he died in service, and he claims seven years' half pay, under the resolutions of May 15, 1778, and August 24, 1780.

I. These resolutions promise seven years' half pay to the widows of officers dying in service; but if there be no widow, or if she marry, then the half pay goes to the children of the officer.

1. It is obvious that the administrator of the officer cannot maintain a suit under the resolutions, but he enters it to the use of T. C. Stem, who is administratrix of Mrs. Catherine Thompson, and whose petition to Congress for the allowance of the claim is among the papers. There is no evidence to prove her intestate to have been the widow of General Thompson, or to show that she survived him seven years—*i. e.*, long enough for the whole annuity to accrue to her.

2. The claim is barred by limitation under the resolutions of Congress of November 2, 1785, (4 Journals, 603,) and July 23, 1787, (id., 762,) as construed by act of March 23, 1792, (1 Stat., 243,) and under the act of February 12, 1793, (1 Stat., 301.)

Relying on these statutes, the counsel for the United States deems it unnecessay to seek far for evidence to prove that General Thompson did not "die in service," and will remark but very briefly on the allegations of the petitioners in that regard.

II. They say he was taken prisoner in June, 1776, and remained a prisoner till the time of his death, September 3, 1781, never having been exchanged, but being a great part of the time on parole at home.

During this period there were two or more reorganizations of the army, by which *some* officers in captivity lost their places. Their pay, of course, continued till their release, but when released they found themselves "deranged" or "supernumeraries."—(See resolutions of November 24, 1778, 3 Journals, 133, 134; May 22, 1779, 3 Journals, 285; May 26, 1781, 3 Journals, 676; February 11, 1784, 4 Journals, 336.)

The rearrangement of the army in 1778–'79 appears to have been commenced by a committee of Congress at the headquarters, and to have been finished by the board of war. A resolution of January 10, 1778, appointed three members of Congress and three members of the board of war a committee to repair to the headquarters of the army, and, in conjunction with the commander-in-chief, "to form and execute a plan for reducing the number of battalions in the continental service." On the 19th of May and 12th of October Congress had reports from the committee under consideration. On the 10th of August two members were added to it, and the resolution of August 29, 1778, (3 Journals, 37,) speaks of "the committee of arrangement

now with the army." The resolution of November 24, 1778, (id., 134,) transferred the business to the board of war, and directed the committee to furnish lists of officers "arranged by them," to the board of war, by whom new commissions were, under this rearrangement, to be issued certainly to some, and probably to all the officers, (3 Journals, 134;) and lists and returns of those retained were to be made, and filed with the board of war and the commander-in-chief, but no returns are directed to be made of those deranged. These proceedings in effect disbanded all officers not expressly retained, and it is for those who claim to have remained in service to show that they were retained.

By the same resolution provision is also made to enable those who have been prisoners with the enemy to "*again enter the service*," if they should desire to do so, and if there should be vacancies.

The resolution of May 22, 1779, (3 Journals, 285,) provides "that the continental officers who are or may be exchanged, and not continued in service after such exchange, be considered as supernumerary officers, and entitled to the pay provided by a resolution of Congress of the 24th of November last."—(3 Journals, 133, 134.)

General Thompson was exchanged. A letter of General Washington, dated November, 1780, and found in Sparks' Life and Writings of Washington, vol. vii, (not vi, as erroneously indexed,) p. 288, so states; and it is admitted, or rather proven, by petitioners that he remained at home during the rest of his life. He therefore did not re-enter the service, but came directly within the resolution of May 22, 1779, as a supernumerary officer.

If, however, it be deemed possible that Thompson did not become supernumerary, the 400 volumes of Washington's papers, in the State Department, could not fail to afford evidence of his continuance in service. It is for the claimant to produce such evidence.

Some of the statements and references made to sustain this claim shows the liability to err in examining facts when the surrounding circumstances have so long passed out of mind. It is alleged, in the petition to Congress, that the officer in question, together with General Lee and Colonel Moultrie, received the thanks of Congress, by resolution of July 20, 1776, which commends their gallantry "on the 28th day of June last," in repelling the attack of the British fleet "in the State of South Caarolina;" and Mrs. Mary Thompson, who married the son of General Thompson as early as 1786, declares in her affidavit that this officer fought at Charleston Neck and Sullivan's Island, and for his services there was appointed brigadier general, and was afterwards taken prisoner at the battle of the Three Rivers, in Canada. This statement is adopted in the manuscript report of the Senate Committee on Revolutionary Claims, filed with the papers.

Now, according to the allegations, which are sustained by the records, Thompson was appointed brigadier March 1, 1776, and captured by the enemy in Canada June 13, 1776. The battle at Sullis van's Island, South Carolina, was on the 28th of June, 1776, as thresolution itself states, and history confims, (see Moultrie's Memoier of the Revolution in the South, vol. 1, pp. 166, 167, 168,) and the resolution styles the meritorious officer colonel, not brigadier. More-

over, the Colonel Thompson named in the resolution is shown by the Journals of Congress, (vol. 1, p. 475,) to have been still in command of his regiment September 14, 1776.

When such mistakes are made by persons who must have, if any person has, reliable information of the services of the officer, it indicates what little correct knowledge those most interested have of the true grounds of the claims which have so long and pertinaciously been pressed upon the attention of Congress. The transactions of the revolution are now beyond the utmost limit which parole testimony has been supposed by law to reach, and I cannot refrain from expressing my conviction that, in the investigation of these claims, it is utterly valueless.

JNO. D. McPHERSON,
Deputy Solicitor Court of Claims.

IN THE COURT OF CLAIMS.

R. C. THOMPSON AND ANOTHER *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The object of this petition is to recover the half pay for seven years of an officer in the continental army of the revolution, who died before the close of the war.

The claim depends upon the following resolutions:

"*Resolved, unanimously*, That all military officers commissioned by Congress, who now are or hereafter may be in the service of the United States, and shall continue therein during the war, * * * shall, after the conclusion of the war, be entitled to receive, annually, for the term of seven years, if they live so long, one-half of the present pay of such officers," &c.—(Res. May 15, 1778, 2 Journals Old Congress, p. 554.)

"*Resolved*, That the resolution of the 15th day of May, 1778, [the above resolution,] be extended to the widows of those officers who have died or shall hereafter die in the service, to commence from the time of such officer's death, and continue for the term of seven years; or, if there be no widow, or in case of her death or intermarriage, the said half pay be given to the orphan children of the officer dying as aforesaid, if he shall have left any," &c.—(Res. Aug. 24, 1780, 3 Journals Old Congress, p. 512.)

The petition alleges that William Thompson was a brigadier general in the continental army of the revolution, and died in service before the close of the war; and that he left a wife and children, who have since died, leaving grandchildren.

The half pay for seven years of General Thompson is claimed, under the above resolutions, by one of the petitioners, as administratrix of Catherine Thompson, who is alleged to have been the widow of the deceased officer; and it is claimed by the other petitioner as administrator and heir of such officer.

There is no doubt but that General Thompson was a brigadier general in the continental army of the revolution, and that he died before the end of the war, namely, about the 3d of September, 1781. It may also be considered, though the point is not clear, that he was in service at the time of his death.

There is no evidence that Catherine Thompson was the widow of the deceased General. The affidavit of Mary Thompson says that, except a pension to his (General Thompson's) widow, the family never received anything for his services. But the witness does not inform us who that widow was. The letters of administration of one of the claimants states that Catherine Thompson was the widow of Brigadier General Thompson; but that does not prove Mrs. Thompson to be such widow, because the statement is not a material part of the letters of administration. But were it admitted that Catherine Thompson was the widow of General Thompson, there are other matters necessary to be proved by her administratrix. She must prove that the widow lived unmarried for seven years after her husband's death, or for some specified period after that event. Without such proof, no claim for any of said half pay could have ever been allowed to the widow or her representatives. There is no such proof. Neither could a claim by the children of the deceased officer for any of said half pay have ever been sustained, without proof that he left no widow, or, if he did, that she died or married at a certain time before the expiration of seven years from her husband's death. There is no such proof.

But, independently of these defects in the evidence, the claim is barred by statutes of limitation. It is now seventy-six years since the death of General Thompson, and the first application for the claim, of which we have any evidence, was a petition to Congress in 1854. The claim is barred by a resolution of Congress of the 2d of November, 1785, (4 Journals Old Congress, p. 603,) and by an act of Congress of the 12th of February, 1793.—(1 Statutes at Large, p. 301.) See the cases of Noble *vs.* The United States, and Jewett *vs.* The United States, in this Court.

The claimants have, neither of them, any cause of action.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 48.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

LLEWELLYN JONES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Letters and other documents referred to in the opinion of the Court, transmitted to the House of Representatives.
3. Opinion of the Court adverse to the claim.

Other papers relating to the case, received from House of Representatives in answer to a call from chief clerk of the Court of Claims, are returned in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 7th day of December, A. D. 1857.
[L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the honorable the Judges of the Court of Claims:

The petition of Llewellyn Jones, of the State of New York, respectfully showeth:

That prior to the year 1844 your petitioner was naval storekeeper at Rio de Janeiro, but that his appointment as such terminated by the provisions of the act of Congress of 17th June, 1844. That thereafter he entered into business relations with a house for ship chandlery at Rio de Janeiro, which was engaged in supplying the navy; which relations were very soon afterwards dissolved, and your petitioner received 2,400 milreis (about 1,200 dollars) for his interest in the

concern, and the profits which had accrued during his connexion with it. That upon some false suggestion of one of the members of said firm, connecting said sum of money with the interests of the United States, your petitioner immediately deposited said sum with James Ferguson, the successor of your petitioner as naval storekeeper, until the decision of the Secretary of the Navy could be had, for which said Ferguson gave the receipt, of which the following is a copy:

RIO DE JANEIRO, *April* 22, 1845.

Received from Llewellyn Jones, esq., late naval storekeeper at this place, the sum of twenty-four hundred milreis, for which sum I hold myself accountable to the Navy Department, subject to any future decision the honorable Secretary of the Navy, or any other authorized officer of the government, may make respecting the same.

JAMES FERGUSON,
Naval Storekeeper.

That afterwards the Navy Department decided that it had no claim for said sum of money, and although it declined giving an order for Mr. Ferguson to pay over the money, it expressed the opinion that he would at once do so, as the following correspondence shows:

NAVY DEPARTMENT, *July* 18, 1845.

SIR: I have received your letter of the 19th ultimo, with its enclosures, relating to a sum of money deposited by you with Mr. Ferguson, United States naval storekeeper at Rio de Janeiro.

The department has given no directions to Mr. Ferguson to receive this money, and does not recognize it as officially in his hands. It makes no decision upon the questions which seem to have led to the deposit, but will hereafter avail itself of any remedy which it may find it necessary to employ for the protection of the government interests at Rio.

You may make such use of this communication as you think proper.

I am, respectfully, yours,

GEORGE BANCROFT.

Mr. LLEWELLYN JONES,
Washington, D. C.

NAVY DEPARTMENT, *July* 28, 1846.

SIR: This department has already informed you, by its letter dated July 18, 1845, that it did not regard the money deposited by you with Mr. Ferguson as officially in his hands. It cannot, therefore, with propriety give any order on the subject.

The suggestion contained in your letter to the Fourth Auditor, which has been referred to this department, cannot, for this reason, be complied with.

Respectfully, yours,

GEORGE BANCROFT.

Lieutenant LLEWELLYN JONES, *&c., &c., &c.*

TREASURY DEPARTMENT,
Fourth Auditor's Office, July 29, 1846.

DEAR SIR: I enclose a letter from the Secretary of the Navy, which I believe agrees substantially with the memorandum enclosed in your letter to me of the 18th instant. After the Secretary has said that he does not regard the sum in question as being officially in Mr. Ferguson's hands, the latter cannot have a shadow of right to require or expect an order of this department for the payment of the money.

The suggestion to which the Secretary refers, when he says he cannot comply with it, is that of his paying the amount here upon your order.

I am, sir, yours, very truly,

A. O. DAYTON.

First Lieut. LLEWELLYN JONES, *U. S. A.*,
St. Louis, Mo.

Yet your petitioner is informed that said sum of money has since been paid into the treasury of the United States, and he has not been able to obtain the same, either from said Ferguson or from the treasury. Your petitioner is sole owner of said claim, and prays judgment of your honorable Court for the amount of said sum deposited with said Ferguson, naval storekeeper as aforesaid, and by him turned over to the treasury of the United States.

LLEWELLYN JONES.
By his attorney in fact, CHARLES DE SELDING.
A. H. LAWRENCE,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County. }

On this 11th day of July, 1855, before me, a justice of the peace in and for said county, appeared Charles De Selding, attorney in fact for Llewellyn Jones, and made oath that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

THOMAS C. DONN.

IN THE COURT OF CLAIMS.

LLEWELLYN JONES *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner states the following case: Prior to the year 1844 he was appointed naval storekeeper at Rio de Janeiro, but his appointment terminated by the provisions of the act of Congress of June 17, A. D. 1844. He afterwards entered into business relations with a house at Rio de Janeiro; but those relations were soon dissolved, and he received $1,200 for his interest in the concern. Upon some false

suggestion by one of the members of the firm—connecting the money with the interests of the United States—he consented to deposit it with his successor, and took from him a receipt, of which the following is a copy:

"RIO DE JANEIRO, *April* 22, 1845.

"Received from Llewellyn Jones, esquire, late naval storekeeper at this place, the sum of twenty-four hundred milreis; for which sum I hold myself accountable to the Navy Department, subject to any future decision the honorable Secretary of the Navy, or any other authorized officer of the government, may make respecting the same.

"JAMES FERGUSON,
"*Naval Storekeeper.*"

This money has since been paid into the treasury of the United States.

The petitioner refers to two letters to him from the Secretary of the Navy, and one to him from the Fourth Auditor, as evidence that the Navy Department had decided that it had no claim to the money so paid by him to Mr. Ferguson. He now claims that it shall be repaid to him.

The circumstances which gave rise to the suspicion that the money now claimed belonged to the United States are stated in a communication from the minister of the United States near the court of Brazil to the Secretary of State, and in a communication from Captain Turner, commanding United States squadron, Brazil station, to the Secretary of the Navy; copies of which are on file amongst the papers in this case.

In the correspondence referred to in the petition, the Secretary of the Navy merely states as follows: "The department has given no directions to Mr. Ferguson to receive this money, and does not recognize it as officially in his hands. It makes no decision upon the questions which seem to have led to the deposit, but will hereafter avail itself of any remedy which it may find it necessary to employ for the protection of the government interests at Rio."

Subsequently, the Secretary of the Navy decided that the petitioner had "no claim to the money," and ordered it to be paid into the treasury of the United States.—(See the letter of the Secretary of the Navy to James Ferguson, dated September 27, A. D. 1849.)

We do not deem it necessary to go into an examination of the circumstances which preceded the deposit made by the petitioner with Ferguson. That deposit was his own voluntary act; and the money was afterwards paid into the treasury of the United States in pursuance of the very terms prescribed by himself. If he did himself injustice, it was his own folly. Whether he did or not, is a question which it is not necessary for us to decide. If the money was his own, he had the right to dispose of it in his own way, and, having so disposed of it, he cannot now recall it. If it was the money of the United States, it was properly paid to them. In either event, the petitioner is not entitled to relief.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 49.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

T. S. J. JOHNSON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Solicitor's brief.
4. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

DISTRICT OF COLUMBIA, }
County and city of Washington. }

To the honorable the Judges of the Court of Claims, &c.:

The petition of Thomas S. J. Johnson respectfully represents to your honors, that he is a native born citizen of the United States, and a resident, for the past eight years, of the city of Santa Fé, in the Territory of New Mexico.

Your petitioner further shows that, on and before the month of August, A. D. 1850, he was engaged in business in said Territory,

among others, as a common carrier for the purpose of transporting goods and other articles from the States to various parts of said Territory, and also from said Territory to old Mexico. Your petitioner was also engaged in said Territory in purchasing grain and forage, and collecting the same in depots for the purpose of sale; and was also engaged as a miller, being the owner of a grist and saw mill, both in active operation at the time he was dispossessed of his property as hereinafter set forth.

Your petitioner would further show, that he was the sole owner of a large number of wagons and teams for the purpose of hauling and transporting goods and other articles; and not having a safe place to store all of them, he asked and obtained leave from Captain A. W. Reynolds, then acting as quartermaster of the United States army, to store them in the government corral at Santa Fé for safe keeping, and in the month of August, A. D. 1850, he stored a number of them in the said corral. Your petitioner further shows, that having use for his wagons in June following, he applied to the wagon master having charge of the corral for them, when, for the first time, he was informed or knew that thirty-two of the wagons had been taken away by the officers and employés of the quartermaster's department for the use of the army, they having been necessary for the service. Your petitioner, immediately after being informed that his wagons had been so taken, applied to Captain A. W. Reynolds for their restitution to him; this reasonable request was refused by Captain Reynolds on the ground that they were necessary for the service, and could not be dispensed with, and he referred your petitioner to Captain L. C. Easton, the superior officer in command. Your petitioner then applied to Captain L. C. Easton for restitution or pay for the wagons at their value, which he refused, and he also referred your petitioner to General Jesup, the Quartermaster General, at Washington city.

Your petitioner was forced to come to Washington, and he applied in person to General Jesup for payment for his wagons, and he refused on the ground that it was a matter in the nature of seizure and sounding in damages, and beyond his control, and referred the claim to the honorable C. M. Conrad, then Secretary of War, to whom your petitioner applied, and he, on the 16th day of November, 1852, after great delay, gave your petitioner an order on the quartermaster's department in New Mexico for the delivery of his wagons to him, and when they were worn out in the service and valueless. Your petitioner refused to accept this order; and after this injustice done him, he applied to Congress for relief, and at the late session a bill was passed for the relief of your petitioner, appropriating the sum of four thousand eight hundred dollars, simply the value of the wagons, which sum has been paid to your petitioner by the Secretary of the Treasury. Your petitioner would at the same time have applied for remuneration for the losses he had consequentially sustained, but was advised otherwise by counsel learned in the law.

Your petitioner further shows, that he purchased these thirty-two wagons, among others, from St. Vrain & McCarty, upon time payment, and made and delivered to them his promissory note for the purchase; and having a contract to haul supplies for the commis-

sary's department of the army, and to haul other goods, he relied upon the money he would have received to pay his note.

Your petitioner further shows that, in consequence of his wagons having been so taken, as aforesaid, and forcibly withheld from him, notwithstanding his several demands as aforesaid, and there being no wagons in the market at the time for sale, and none, in fact, to be had, your petitioner was totally unable to fulfil a contract he had entered into to haul goods into Chihuahua, and thereby lost the amount he would have received for the same, being ten dollars per day for each wagon and team, or the sum of twenty-two thousand and four hundred dollars, this being the rate for said hauling at that time.

Your petitioner would further show that, in addition to the foregoing loss, at his principal depot or corral at the Valle Grande, in said Territory, he had stored a quantity of goods, hay, grain, and other property; and had his mules and oxen for safe keeping, the oxen and mules intended for hauling and to be used in his wagons so taken, as hereinbefore stated; that, in consequence of the wrongful taking aforesaid, he was deprived of the means to bring his grain and hay to market for sale; that, unexpectedly, the Indians made a sudden attack upon the corral, shot and wounded some of his men in charge of his property, ran off his mules and oxen, and part of his goods, and destroyed the remainder of his property therein stored. The loss he sustained hereby was twelve thousand dollars, being the cost and value of his property, and, by reason of this, was also totally deprived of the means to fulfil his contract with the commissary department, and deprived of the profit he would have derived from it.

Your petitioner would further show that, in addition to the foregoing loss, he was deprived of the means of hauling into Santa Fé, for safe keeeping, the grain and forage he had purchased and collected in his depots in the country, and being thus left, the same were, in some instances, destroyed and carried away by the Indians, who made sudden incursions into the settlements where stored; and in other instances so damaged by the inclemency of the weather, the rainy season having set in, as to render them valueless, and your petitioner in some instances was forced to abandon them, and, in others, to sell them at reduced rates to his damage and loss, six thousand dollars. Your petitioner was also deprived of the profits he would have derived had he been able to bring them to market, which, at the lowest rate at the time, would have been twenty-five per cent. on the last named amount.

Your petitioner would further show, that the said note given by him for the purchase of the wagons to St. Vrain & McCarty, he was unable to pay when it became due, in consequence of the disasters that befell your petitioner by reason of the wrongful taking of his wagons, and his inability to procure others. While your petitioner was urging his claim, St. Vrain & McCarty instituted suit upon the note, in the United States court at Santa Fé, and obtained judgment against your petitioner, and upon it an execution was sued out of the court, and the saw and grist mill, together with a large quantity of cut timber and sawed lumber, was levied upon by the United States marshal and the whole sold at a great sacrifice to satisfy said judgment, and at the

time your petitioner was in Washington endeavoring to obtain pay for his wagons. Your petitioner has from that time to the present been totally deprived of the mill, timber, lumber, and everything connected therewith; and his mill being the only one in use in the neighborhood of Santa Fé, was a monopoly almost, and the loss sustained by your petitioner in the probable profits he is unable to say; but the value of the mill, timber, and lumber on hand ready for sale, was five thousand dollars, and the net profits of his mill per day was five dollars, of which he has been deprived in consequence of the sale thereof.

Your petitioner would further say, that, in consequence of the taking of his wagons, as aforesaid, and the disasters that followed him by reason thereof, he has suffered irretrievable damage to his credit as a man of business, which your honors could not, by any powers within your duties, adequately remunerate him for.

Your petitioner avers that he was then, and is now, alone interested in the foregoing claim, and most respectfully prays that your honors will take this his petition and the matters and things therein set forth under your consideration, and award him such pecuniary remuneration and compensation for the losses and injury he has sustained, and cost he has been put to in prosecuting his claim, that your honors may deem just and proper; and that you will grant him such further and other relief in the premises as the nature of the case requires.

And your petitioner will ever pray, &c.

J. H. PETERS,
Solicitor for Petitioner.

THOMAS S. J. JOHNSON vs. THE UNITED STATES.	Before the Court of Claims of the United States, Washington city, D. C.

Brief of the Petition.

The petition sets forth that the claimant is a citizen of the United States, and was heretofore engaged in business in the Territory of New Mexico as a common carrier, a dealer in produce and merchandise, and also a miller; that he was the owner of a large number of wagons, and teams of oxen and mules; that he expressly purchased some large road wagons, thirty-two in number, to fulfil a special contract he had made to haul goods into old Mexico; that he stored his wagons, by leave of the quartermaster of the United States army, in the government corral at Santa Fé, for safe keeping, from which they were taken and used by the officers of the quartermaster's department without the knowledge or consent of the claimant, the government being without a supply of wagons; that when claimant became aware of their having been taken, he immediately applied to the commanding officer for restitution, and was refused them upon the ground th t they were necessary to the service and could not be dispensed with.

The petition further sets forth that, after great delay and expense, Congress at the last session paid claimant the value of them at the time taken, without interest or other compensation; that he lost the contract for hauling goods into old Mexico by reason of the taking of his wagons; that he was deprived of the means to haul his grain, then stored in various parts of the country, into a place of safety, when they were destroyed by the sudden irruption of the Indians; that he lost by the same means the teams of mules and oxen and other property placed in his depot at the Valle Grande, which were driven off and destroyed by the Indians; that he suffered other losses from the wrongful taking of his wagons, as specially set forth in his petition, reference being had thereto will more fully appear. All which losses amount to the full sum of sixty-five thousand dollars, which made him a bankrupt.

The claimant, in consideration of which, prays he may be indemnified for his losses, &c., &c., &c.

J. H. PETERS,
Solicitor for Claimant.

IN THE COURT OF CLAIMS.—No. 134.

ON THE PETITION OF THOMAS S. J. JOHNSON.

Brief of the United States Solicitor.

This is a claim for consequential damages alleged to have been occasioned by the taking of thirty-two wagons, the property of the claimant, for public use.

Full compensation has been made for the wagons, under act passed at the last session of Congress.—(See Private Acts, page 140.)

He now claims indemnity for grain destroyed by Indians and by weather, which he alleges occurred because he was disabled from hauling it to a place of security; also profits on the sale of the grain; also mules, oxen, and other property destroyed by the Indians for the same reason; also the profits on a contract he had entered into to haul goods; also for a saw and grist mill, and lumber, sold in consequence of the failure of his other business caused by the loss of the wagons, and for the profits on the milling business;—making a total loss of $65,000. The wagons were placed, by the consent of the United States quartermaster at Santa Fé, in the public corral for safekeeping, in August, 1850; and in June, 1851, when petitioner wanted to use them, he found they had been taken away, and were in use by the officers and employés of the government, and his demand for restitution was disregarded by the officers in New Mexico; but on application to the quartermaster general, he ordered them to be delivered up. As they had then been much used, the petitioner refused to receive them, and applied to Congress for compensation for them, which was granted. Having received full compensation for wagons found in the public store and used for public purposes, without then setting up any claim for anything more, and thus waiving all pretence of

even trespass, he now seeks damages of a character more remote than any ever accorded for a deliberate and malicious wrong.

I contend, therefore, 1st, that having sought and received compensation for his wagons; having waived at the time all claim founded on the manner or circumstances under which they were taken, he is precluded, by legal and moral considerations, from setting up the present claim.—(Tidd's Practice, 1 vol., p. 10; Chitty Pleadings, 1 vol., p. 188.)

2d. The circumstances of the case would not entitle the petitioner to anything more than he has received, if he had not waived all further claim by his former proceedings.—(See Sedgewick on the Measure of Damages, chap. 3, page 63.)

3d. The court has no jurisdiction of the case.

M. BLAIR.

THOMAS S. J. JOHNSON *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

The material facts, as alleged in the petition, are as follows:

In August, 1850, the claimant having a large number of wagons at Santa Fé, in New Mexico, placed them, for safe keeping, in the government corral at Sante Fé, by the permission of the assistant quartermaster there.

In June, 1851, the claimant applied to the wagon master of the corral for his wagons, when he was informed, for the first time, that thirty-two of them had been taken by the officers and employés of the quartermaster's departmemt for the use of the army, they being necessary for the service. Immediately after that information, the claimant applied to Captain Reynolds (an assistant quartermaster at Santa Fé) for a return of the wagons. The application was refused. The claimant then applied to Captain Easton, (an assistant quartermaster at Santa Fé,) the superior officer in command, "for restitution or pay for the wagons at their value," but the application was refused. He afterwards applied to the Quartermaster General at Washington "for payment for his wagons." This application was also refused. Application was afterwards made by the claimant to the Secretary of War, who, in November, 1852, gave the claimant an order on the quartermaster's department in New Mexico for the delivery of the wagons to him. The wagons, however, being then worn out in the service and valueless, the claimant refused to accept the order, and applied to Congress for relief. The following act was thereupon passed in March, 1855:

"*Be it enacted* * * * *, That the Secretary of the Treasury of the United States be required to cause to be paid to Thomas S. J. Johnson, out of any money in the treasury not otherwise appropriated, the sum of four thousand and eight hundred dollars, in full compensation for thirty-two wagons, the property of the said Thomas S. J. Johnson, taken by the officers of the United States army and appropriated to necessary public use."—(10 Stat. at Large, p. 864.)

That sum, thus appropriated, was "simply the value of the wagons;" and the money was paid to the claimant by the Secretary of the Treasury.

The claim now made in this court against the government is for damages for the aforesaid seizure and taking away of the claimant's wagons by the officers and employés of the government.

We think that this suit cannot be sustained. The quartermaster at Santa Fé had authority to purchase wagons in the discharge of his duties there, and, consequently, when he converted the claimant's wagons to public use, the law implied a promise on the part of the government to pay the claimant for the wagons what they were worth, as for goods sold and delivered. The contract thus implied was within the scope of the quartermaster's authority, and the government was bound by it; and, had the wagons not been paid for, the claimant might have recovered their value by a suit in this Court against the government.

But for the trespass or other wrongful acts charged to have been committed by the officers and employés aforesaid, and on which the present suit is founded, the government is not responsible. For the damages which the claimant may have sustained on account of such wrongful acts, his only legal remedy is against the individuals who committed the injury.

Order for taking testimony is refused.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 50.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully present the following documents as the report in the case of

J. H. KING, ADMINISTRATOR OF JAMES GREER.

vs.

THE UNITED STATES.

1. The petition of the claimant and amendment.
2. James Greer's patent and other documents, referred to the Court of Claims by the House of Representatives, used as evidence on trial of the case, and returned to the House of Representatives.
3. Other documents referred by the House of Representatives, and returned to that House in a separate envelope.
4. Claimant's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

JAMES GREER'S HEIRS *vs.* UNITED STATES. } Amended Petition.

To the honorable the Judges of the Court of Claims.

Your petitioner, John H. King, one of the heirs of said James Greer, deceased, respectfully represents that, since the filing of the petition to which this is an amendment, he has taken out letters of

administration on the estate of said Greer, in the county court of Jefferson county, Virginia, in which county said Greer resided at the time of his decease, and has executed bond, with suitable security, for the due performance of his duties as such; and certified copies of the records in said case will be duly filed in your honorable Court.

Your petitioner prays that the claim be recognized hereafter in his name, as administrator, and he renews the allegations in said original petition. He alleges that the honorable Court has jurisdiction in this case by virtue of the act of Congress organizing it; and, also, that neither your petitioners ancestor, said Greer, nor any of his heirs, ever received any compensation from the United States, or any person for them, for the use of said nut-borer for the manufacture of guns.

JOHN H. KING, *Administrator.*

STATE OF MARYLAND, *Washington County,* } *ss.*

This day personally appeared before me, the subscriber, a justice of the peace of the State and county aforesaid, John H. King, and made oath on the Holy Evangelist of Almighty God, that the matters and facts set forth in the foregoing affidavit are true to the best of his knowledge and belief.

Sworn before

J. COOK, *J. P.*

MARYLAND, *Washington County,* } *to wit:*

I hereby certify that John Cook, esq., before whom the above and foregoing affidavit was made, and who hath thereunto subscribed his name, was, at the time of so doing, a justice of the peace in and for said county, duly elected, commissioned, and sworn, and that his signature thereto is genuine.

In testimony whereof, I hereunto subscribe my name and affix the seal of the circuit court for said county this 14th day of April, 1856. [SEAL.]

ISAAC NESBITT, *Clerk.*

COURT OF CLAIMS.

JNO. H. KING, Adm'r of JAMES GREER, deceased, *vs.* UNITED STATES.

Claimant's Brief.

The claimants intestate invented a machine for boring gun barrels, for which he took out a patent, dated October 3, 1817. It was called the nut-borer. It was used by the United States, during the whole term of the patent, in the public armories, and private contractors' shops, and they have paid nothing therefor. It was to recover compensation for that use this case was brought.

Parallel cases are on record where the defendants purchased from patentees the right to use their inventions. Blanchard's stock turning machine is a case in point. One-half of what was saved in the making of stocks by the use of the machine was paid the inventor. That amount was ascertained officially in the Ordnance Office. To come at a knowledge of the same fact in this case, a call was made on the Secretary of War, whose answers and exhibits are in the papers.

The Secretary of War's Report.

The only statement in the case, which is unfavorable to the claim, is the above report, and accompanying documents. But for them, I should submit the case to the Court. They require some comments.

The colonel of ordnance avows that he has no information in his office upon the point called for, nor can he obtain any from Harper's Ferry nor Springfield. Although there is a confession therein of a great deficiency in the records of that office, yet if he had stopped there, it would have better comported with the justice and propriety of the case. Instead of that, he goes on and sends to the Court, a letter containing comments adverse to the claim, based upon letters of Col. Wadsworth—and upon the adverse proceedings in Congress against it, and fails to send the final action of the Com. of House of Representatives, in its favor. They are both in the case, and will speak for themselves.—(Doc. No. 104, 1st. session, 28th Congress, House of Representatives, and Mr. Faulkner's report.)

Colonel Wadsworth's letters were written upon calls from committees of House of Representatives, upon the claims of Pettibone in the first place, and of Greer in the second place. Pettibone it appears claimed for an improved mode of making the nut auger. Colonel Wadsworth, opposed it because he had seen the auger in 1798 at McCormick's, in Philadelphia. McCormick said he had not invented it. The colonel gives the opinion it came from Europe; think she saw a description of it in some book; name not given! It was introduced into the armories from McCormick's.

Greer's case being before a committee, in answer to a call for information, a copy of letter A is sent, and an assertion added, without proof, that there is unquestionable evidence of the instrument having been used prior to 1796! Had he said prior to 1798, he would have been right.

Colonel Wadsworth saw it nowhere but *at McCormick's and at the armories*, into which it was carried thence.—(See letter of Thomas Smith, (10) dated 1821.)

As no proof is furnished by either of the ordnance officers to support their vague opinions, we will turn to such proof as the claimants have heen able to produce.

I rely on the proof in the case to make the following points:

1. That James Greer was the original inventor.
2. That the United States are bound by their patent to him.
3. That he has been diligent in demanding compensation of the United States, and that they have failed to pay.
4. The value of the invention to government.

On 1st point, see (1) Thomas Humes' deposition. He and Greer worked at McCormick's shop in 1798, (it should have been 1797;) they complained of the defects in the square bits. Greer undertook to make a new tool, and invented the "nut borer." Also (2) Dennis O'Byrne saw Greer's nut borer at McCormick's; made a drawing of it; sent it to Joseph Perkins, an officer at Harper's Ferry. Colonel Wadsworth first saw it at McCormick's shop in 1798, (No. 9.) Engles says he was at work at Harper's Ferry in 1803, when Greer came there and introduced his nut-borer. (6) Benjamin Moore and all the old workmen whose depositions are on file in the case, refer back to Greer as the inventor, no other person being named as a rival in the invention.

Upon the second point, the patent shows a grant by the United States to Greer, of the exclusive use of the instrument for 14 years, without reservation in favor of the government, and is an estoppel to a plea of prior invention in another, or of prior use by itself.

Curtis on patents, 52, 53, 55, 56, 57, and notes; 3 Black. 308, 7 Peters, 292, &c.; 2 Peters, 19.

On the third point, Colonel Stubblefield and Captain Morton prove demand of compensation on the Ordnance Office, and a failure to pay, and the proceedings in Congress prove persevering efforts before the legislature, and their failure.

On the question of value, Col. Stubblefield, superintendent at Harper's Ferry, and Benjamin Moore, master armorer, declared the invention to be indispensable to the armories.

The workmen who had used the old plan and then the Greer auger, estimate a difference of about five to one in favor of the latter. A workman using the square bits, could bore but 1 to 4 barrels per day, and much inferior in finish, with much greater expense in keeping up the tools, while with the auger, 25 barrels per day could be bored of superior finish, and but little if any expense in repairing tools.

If it is desired to ascertain what the United States saved in actual expense by the use of the auger; it can be learned by comparing the cost of boring 1 to 4 barrels per day—$1 50 to $2—with expense on tools added, equal to about 50 cents per barrel—with the cost of boring with the auger, 7 cents per barrel, which is the amount allowed at the armory, being a difference 43 cents on each barrel. But the increased rapidity in the making and the superior quality of the guns when made, are elements of value, and should be estimated in the price to be paid.

See affidavitt of Greer, showing cause of delayed application for patent. William Thorntorn's letter of 1817; affidavit of Jno. M. McCalla on record of suit at Philadelphia.

See depositions Nos. 5, 6, 9, and others relating to value of instrument and cost of boring.

See original patent, A.

See official report from Ordnance Office of number of arms made during the continuance of the patent.

The amount saved in cost of boring barrels can be estimated from the above data. The amount which should be allowed the inventor I submit to the judgment of the Court.

JNO. M. McCALLA,
Attorney for Claimant.

KING, ADMINISTRATOR OF GREER, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a suit brought by the administrator of James Greer against the United States. The object of the suit is to recover damages from the government for the alleged infringement of a patent granted to Greer in 1817. The patent is as follows:

"THE UNITED STATES OF AMERICA—*To all to whom these letters patent shall come*:

"Whereas James Greer, a citizen of the United States, hath alleged that he has invented a new and useful improvement, being a nut-boring bit, with the machine connected therewith, for boring musket, rifle, and pistol barrels, &c., which improvement he states has not been known or used before his application, hath made oath that he does verily believe that he is the true inventor or discoverer of the said improvement, hath paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said James Greer, his heirs, administrators, or assigns, for the term of fourteen years, from the third day of October, one thousand eight hundred and seventeen, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said James Greer himself, in the schedule hereto annexed, and is made a part of these presents.

"In testimony," &c.

The complaint is, that the government has violated Greer's patent right, by using the patented instrument during the existence of the patent; that is, from the 3d of October, 1817, to the 3d of October, 1831.

There is no plea filed, nor does the practice of the Court require any. The claimant is obliged, of course, to prove every material allegation in his petition, and the defendant has the right to prove any proper defence he may have to the suit.

In this case the alleged breach of the patent is clearly proved. The affidavits of Jacob Engles and George Zorger show that the nut-borer in question was in use in the national armory at Harper's Ferry, in Virginia, before the date of the patent; and that it continued to be used there during the whole time embraced by the patent. It also appears by the affidavit of James Stubblefield, a superintendent of the armory, that soon after the patent was obtained, the patentee, Greer, notified him that he, Greer, must be paid a fair compensation for the use of the patent, or that the armory must cease to use it. This affiant also proves the use of the instrument in the armory for many years during the existence of the patent.

It must be considered, therefore, that the patent, if valid, has been infringed by the government.

The Solicitor makes two objections to the validity of the patent: *First*, that the patented instrument was not a new invention by Greer; *secondly*, that it was in public use before the application for the patent.

We will first inquire whether Greer was the first and true inventor of the instrument in question. He states in his specification, that he invented and discovered the instrument in November, 1797, whilst employed as a workman by Mr. McCormick, in his manufactory near Philadelphia; but there is no evidence whatever of Greer's making the discovery so early as 1797. His only positive evidence relative to the discovery is the affidavit of one Thomas Hume, made on the 14th of July, 1817. This affiant states that he entered into the employment of McCormick, gun maker, of Philadelphia, early in the year 1798; that, about the month of November of said year, he commenced boring gun barrels with another workman of McCormick's, by the name of James Greer; that for some time after they began boring gun barrels, he labored under considerable inconvenience from an injudicious construction of the boring bits, (neither of these men being professional borers;) that after repeated trials with boring bits of different construction, none of which answered the desired end, his shop-mate, James Greer, suggested the idea and immediately set about making one of the following description, which, when completed, to their great satisfaction answered their most sanguine expectation.

The affiant then describes the instrument, which is probably the same for which Greer afterwards obtained a patent.

Byrne's certificate, which we shall refer to again, speaks of the machine constructed by Greer at McCormick's factory.

S. Chambers, in his affidavit, made in 1842, says that he had been employed in the Harper's Ferry armory for 22 or 23 years, and that the present plan of rough boring barrels, he had always understood, was the invention of James Greer. He says further, that though he never worked at rough boring on any other plan than the one invented by Greer, he could safely say that the invention was a very important one.

There is an affidavit of E. H. Chambers, very similar to that of S. Chambers.

The affidavit of J. Engles says that Greer, in 1803, introduced into the armory at Harper's Ferry, an improvement for the rough boring of gun barrels, for which he afterwards obtained a patent. The affiant also says that the facility of boring was greatly increased by Greer's invention.

G. Zorger, in an affidavit made in 1842, says that he knew the then plan of boring gun barrels at Harper's Ferry, where he had been employed for 34 or 35 years, was the invention of Greer.

B. Moore's affidavit states that the affiant had acted as master armorer at both the national armories; and that in view of all the circumstances which had come under his notice, he was fully convinced that Greer invented the instrument aforesaid.

J. Stubblefield, in his affidavit, states that he was superintendent of the armory at Harper's Ferry from 1807 to 1829; and that Greer, who was employed in the armory, had invented an important machine for boring gun barrels, for which he obtained a patent.

Mr. Wadsworth, colonel of ordnance, in a report made in January, 1817, relative to a claim of one Pettibone, states as follows:

"I have a perfect conviction, and perhaps I may say knowledge, that the screw auger or nut auger, used in boring barrels, was not invented by Mr. Pettibone. That tool I saw in use at the Globe Mills, near Philadelphia, in the year 1798; and its properties were particularly described to me by Mr. McCormick, who had introduced it there. McCormick was an Irishman, and I believe is since dead. He did not pretend it was his own, nor even a new invention at that time; and I believe it was introduced into this country from Europe. In a printed book, to which I cannot now particularly refer, I remember to have seen, many years since, an allusion to that tool, and its peculiar advantage represented to consist in its leaving the cuttings behind in the operation of boring, which implied that the tool was drawn and not propelled through the barrel. I entertain not a shadow of doubt the invention was of a date many years anterior to the year 1798."

There is another report of Col. Wadsworth, dated Ordnance Office, 19th February, 1820. The writer, in this report, says: "The present petitioner, Greer, goes a little further back, pretending to have invented the tool or instrument in 1797. But the truth is, there is unquestionable evidence of its having been in common use anterior to the year 1796; and it is reasonable to believe the invention is of considerably older date. I am entirely convinced the merit of this invention is due neither to Pettibone nor the present petitioner, Greer."

We believe that the foregoing are all the material facts before us relative to the question whether or not Mr. Greer was the first and true inventor of the boring machine aforesaid. The question is by no means a clear one; and as a decision of it is not, in our opinion, necessary to the determination of the case, we pass it by without further comment.

The other question, as to the validity of the patent, namely, whether the said instrument was in public use previously to the application for a patent? we shall now proceed to consider.

Colonel Wadsworth saw the instrument in use in the Globe Mills, near Philadelphia, as early as 1798, when its properties were described to him by Mr. McCormick, who had introduced it there, and who did not pretend that it was a new invention. Colonel Wadsworth says, also, that from Mr. McCormick's works the use of the instrument was extended, about the year 1799, to Springfield and the other places where the business was carried on.

Mr. Byrne's certificate states that he made a drawing of the plan of the machine, for an officer of the Harper's Ferry armory, from which a machine was constructed and put in operation a short time after the armory was established.

Mr. Engel's affidavit says that Greer introduced the machine into the armory at Harper's Ferry, in 1803, where it had been in use ever since.

The affidavit of Mr. Zorger, made in 1842, states that he had been employed in the Harper's Ferry armory for the thirty-four or thirty-five years then past, and that the machine was in use in that armory when he was first employed in it, and has ever since been in use there.

Mr. Moore's affidavit says, that the method of rough boring gun barrels with nut augers was introduced into the Sprinfield armory, between the years 1800 and 1808. This affidavit says further, that as early as 1808 or 1709, the United States contractors rough bored their gun barrels with nut augers.

The above is the evidence in regard to the question, whether the aforesaid boring bit was in public use or not before the patent was applied for; and it is very clear that that question must be answered in the affirmative. The instrument was in public use, that is, it was used publicly at McCormick's factory, near Philadelphia, in 1798. It was introduced into the national armory at Springfield, Massachusetts, in 1799, according to one witness, and between 1800 and 1808, according to another. Greer himself introduced the instrument into the national armory at Harper's Ferry, Virginia, in 1803, where it has continued ever since to be publicly used.

We are now to inquire what the law is relative to the effect of the prior use of the instrument on the question as to the validity of the patent.

The patent was granted under the act of Congress of 1793, which act was in force during the time for which the grant was made. There are other statutes relative to patents, passed since the act of 1793, but they have not altered the law as respects this case. The act of 1793 is repealed by the act of 1836; but still the case must be decided as if the former act remained in force.—(McClurg *vs.* Kingsland, 1 How., 202, 206.)

The act of 1793, which governs this case, commences as follows:

"That when any person or persons, being a citizen or citizens of the United States, shall allege that he or they have invented any new and useful art, machine," &c., "not known or used before the application, and shall present a petition to the Secretary of State," &c., "it shall and may be lawful for the said Secretary of State to cause etters patent to be made out," &c.—(1 Stat. at Large, 318, sec. 1.)

The applicant, therefore, in order to procure the patent, was obliged to allege, among other things, that the instrument in question was not known or used before his application. He made the allegation, and obtained the patent. It now appears that the allegation was not true. That there was no prior use was a precedent condition to the grant; and as that condition did not exist, the grant was void. This principle has been decided by the Supreme Court of the United States. Judge Story, in delivering the opinion of the court, says:

"If an invention is used by the public with the consent of the inventor at the time of his application for a patent, how can the court say that his case is, nevertheless, such as the act was intended to protect? If such a public use is not a use within the meaning of the statute, how can the court extract the case from its operation, and support a patent where the suggestions of the patentee are not true, and the conditions on which alone the grant was authorized to be

made, do not exist? In such a case, if the court could perceive no reason for the restrictions, the will of the legislature must still be obeyed. It cannot and ought not to be disregarded where it plainly applies to the case. But if the restriction may be perceived to have a foundation in sound policy, and be an effectual means of accomplishing the legislative objects, by bringing inventions early into public and unrestricted use; and, above all, if such policy has been avowed and acted upon in like cases in laws having similar objects, there is very urgent reason to suppose that the act, in those terms, embodies the real legislative intent and ought to receive that construction."—(Pennock *vs.* Dialogue, 2 Peters, 1, 21.)

That opinion has been confirmed by several others of the same court.—(Grant *vs.* Raymond, 6 Peters, 218; Shaw *vs.* Cooper, 7 Peters, 292; McClurg *vs.* Kingsland, 1 Howard, 202.)

The English statute of James I, of Monopolies, is very similar, as to the question before us, to our act of 1793. By the English statute the grant is to the inventor of such manufactures "which others, at the time of making such letters patent and grants, shall not use."—(Webster on Patents, 29.) The decisions of the English courts under that statute are, that if the manufacturer was, at the date of the patent, in use in public so as to come to the knowledge of other persons than the inventor, the patent is void, as being contrary to the condition on which patents are granted.—(Carpenter, *vs.* Smith, 9, Meeson & Welsby, 300; Heath *vs.* Smith, 3 Ellis & Blackburn, 256.)

The claimant contends that the government is estopped by the patent from denying its validity; but in that he is mistaken. It is true, that if an individual grantor affirms in the deed of conveyance that he is seized of a particular estate, or asserts in the deed any other fact, he is estopped from afterwards denying the fact thus asserted. But that rule does not prevent the grantor from showing that the deed never had any legal existence. It is decided that such grantor is not estopped from showing that the conveyance is void in law. (Doe d. Preece *vs.* Howells, 2 Barn. & Adol., 744.) The rule must be the same in the case of a patent. In the present suit, which is for the infringement of a patent right, the defence relied on is, that the patent was void from the beginning; and, as we have already shown, that defence is established by the testimony. The patent was granted, not absolutely, but upon certain conditions annexed to it by law; one of which conditions was, that before the time of the application for the patent, the instrument was not known or used by others. That condition was a precedent one. And as the government has proved that the instrument was, before the application, known and publicly used by persons other than the patentee, the right mentioned in the patent never vested in the patentee. The patent was a nullity, and the patentee was, of course, entitled to no benefit under it.

This view of the subject renders it unnecessary for us to examine the question whether the doctrine of estoppels applies in any case to the government.

It may be proper to mention that no objection was made to the competency of any of the evidence referred to in this opinion.

Our opinion is, that the claimant has no cause of action.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 51.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

R. L. PAGE, ADMINISTRATOR OF W. B. PAGE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Letters of administration and other documents received as evidence in the case, transmitted to the Senate.
3. United States Solicitor's brief.
4. Claimant's brief.
5. Opinion of the Court adverse to the claim.
6. Other documents in the case referred by the Senate to the Court of Claims and returned to the Senate in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

Petition.

RICHARD L. PAGE, Adm'r of Wm. B. Page, deceased, *et al.*
vs.
THE UNITED STATES.

To the honorable the Judges of the Court of Claims:

Your petitioner, a citizen of Norfolk, Virginia, respectfully represents, that he is the administrator of the estate of William B. Page, who departed this life about the month of July, in the year 1845, in Washington city, D. C., and that said William B. Page, deceased,

was, on the sixth day of May, in the year 1837, regularly appointed a clerk in the Treasurer's office, in place of William Adams, deceased.

He shows that by the act of Congress approved July 20, 1836, "to change the organization of the Post Office Department," &c., (Statutes at Large, vol. 5, ch. 270, sec. 21, page 84,) it was enacted "that there shall be employed by the Secretary of the Treasury three clerks—one at a salary of $1,400 per annum, one at a salary of $1,200 per annum, and one at a salary of $1,000 per annum—in the office of the Treasurer of the United States, in lieu of the same number of clerks now employed in the office of the Fifth Auditor of the Treasury, in adjusting the accounts of the Post Office Department." In obedience to this law, Mr. Jonathan Guest was transferred to the Treasurer's office, at the salary of $1,400, Mr. Leightner at the salary of $1,200, and Mr. William Adams at the salary of $1,000 per year, on the 6th of July, 1836. As said William B. Page was appointed to fill the vacancy occasioned by the death of Mr. Adams, his salary was at the rate of $1,000 per year, and he took the oath of office on the 9th of May, 1837. And your petitioner states that, by an act approved 26th August, 1842, ch. 202, sec. 2, Statutes at Large, vol. 5, p. 523, it was enacted that "the compensation of the clerk authorized by the act of May 26, 1824, in the Treasurer's office, is hereby increased to $1,000, and the compensation of the clerk in the same office, authorized by the act of July 2, 1836, is hereby increased to one thousand two hundred dollars."

By this act of Congress said W. B. Page, who so filled the place of Mr. Adams, deceased, and who was so authorized by act of July 2, 1836, became legally entitled to the said increase of two hundred dollars per year, and continued in that office until the 2d day of August, 1845, but was paid no more than at the rate of $1,000 per year. So that for the time from and after the 26th August, 1842, up to the 2d of August, 1845, being two years eleven months and two days, there was justly due to him, in arrear, and unpaid, the sum of $584 44, being at the rate of two hundred dollars per year for that time, unjustly and illegally withholden from his salary as established by law. Said W. B. Page applied during his lifetime to the Secretary of the Treasury of the United States for the payment of the above claim of $584 44, which was refused. He also presented said claim by memorial to the Congress of the United States, which was presented in the Senate at the second session of the 30th Congress, and referred to the Committee on Claims of that body, but no action was had thereon. No other action was had upon said claim during the lifetime of said W. B. Page, and none since his death; and the whole amount of said claim being still due and owing from the government of the United States, your petitioner prays judgment of the honorable Court of Claims for the amount—$584 44.

Mrs. Ann Page, the mother, Charles H. Page, Mann R. Page, John R. Page, Thomas S. Page, Mrs. Roger Jones, brothers and sister, and your petitioner, also a brother of said Wm. B. Page, deceased, are the sole owners and only persons interested in said claim.

RICHARD L. PAGE.

WASHINGTON COUNTY, } ss.
District of Columbia,

On this twenty-second day of May, A. D. 1856, before me, Benjamin K. Morsell, a justice of the peace in and for the county and district aforesaid, personally appears Richard L. Page, the petitioner named in and who subscribed the foregoing petition, and makes oath upon the Holy Evangely of Almighty God that the facts set forth in the above petition are true, according to the best of his knowledge and belief.

B. K. MORSELL,
Justice of the Peace.

M. THOMPSON,
JOHN C. DEVEREUX,
Attorneys for Petitioner.

The accompanying papers, correspondence, &c., in this case, were referred to this court by resolution of the Senate of June 5, 1856.

M. THOMPSON,
Attorney for Petitioner.

COURT OF CLAIMS.

RICHARD L. PAGE, administrator of W. B. PAGE, deceased, and JOHN G. HEDGEMAN, *vs.* THE UNITED STATES. } Points of petitioners.

Statute at Large, vol. 5, 84, 523; 3 How., p. 24; 2 Attorney General Opinions, 582–'3; Broon's Legal Maxims, p. 91, latest edition; Dwarris on Statutes, p. 725; Educk's case, 5 Rep., p. 118.

It is no valid objection to this claim that no formal demand may not have been made for the increase; for suppose my learned friend, the Solicitor, who now receives $3,500 per annum, should have his salary increased to $4,000 per annum by act of Congress, and he should receive and receipt for but $3,500 per annum, would that preclude him from demanding and receiving the remaining $500 at any subsequent time? And suppose the Solicitor should remain in office a number of years, and receive but the $3,500, and leave the $500 in the treasury, and then die or resign, and a successor be appointed in his place, would that successor be precluded from demanding more than $3,500; or would he not be entitled to $4,000 per annum? Would it make any difference that his letter of appointment should state his salary to be $3,500 per annum? For suppose in that letter of appointment his salary should be stated to be $3,500 per annum instead of $4,000 per annum, would it be pretended that he would be legally entitled to but $3,500? No! For it is the law that governs the rate of salary, and not the letter of appointment.

When Hedgeman received the appointment to a clerkship in the Treasurer's office, he is supposed to have looked to the act of 1836 and

1842 authorizing the appointment and fixing the salary, and there seen that the office which had been filled by Page had been increased by the latter act to $1,200 per annum, and had reason to suppose that his salary would be $1,200 per annum.

It is shown by the certificate of Mr. Casey, the Treasurer, and by Mr. Randolph's letters, that Hedgeman was appointed to, and filled and discharged the duties of the same office that Page filled. Hedgeman's rights are therefore identical in all respects with Page's. It does not appear that Hedgeman's letter of appointment stated what his salary should be. It only appears that he was appointed to the office in the Treasurer's office, made vacant by the removal of Page. Suppose Hedgeman's letter of appointment should say, you are hereby appointed a clerk in the Treasurer's office, with a salary of $2,000 or $10,000 per annum. Will it be pretended that he would be entitled to the $2,000 or $10,000 per annum? No. He would be restricted to the amount allowed by law. Thus we see that it is the law, and not the letter of appointment, or the arbitrary will of the department, that regulates and fixes the salary. The argument of Mr. Randolph and the learned Solicitor is, that salary, *ipso facto*, leads, regulates, and controls office. I maintain the very converse of the proposition to be true. It is office that regulates and fixes salary, and not salary office. Suppose the Secretary of the Treasury should determine to pay the salary of his chief clerk to one of his subordinate clerks, and *e converso*, would that transposition of salary amount to a transposition of office and of duty, and of right to salary of the chief clerk?

The salary and the clerk and clerkship alluded to and increased by the act of 1842, is admitted to be Page and his clerkship. A clerk may sometimes, (as in this case,) but not always, be identified by salary. Had there been two or more clerkships and clerks in the Treasurer's office at a salary of $1,000 each, and the act of Congress had said the salary of a clerk or of the clerk in the Treasurer's office is hereby increased to $1,200 per annum, then it would have been impossible to distinguish from the face of the law what clerkship or clerk was referred to in the law. In this case Page and Hedgeman were held to the performance of the duties of the clerkship, the salary of which was increased by the act of 1842, while the $200 increase was paid to another.

Determined as they were that Page and Hedgeman should not have the increase of $200, they should have removed them from the clerkship which they filled, and placed them in a clerkship of $1,000, and placed their favorite, Mr. Nutt, in their place, and then it would have been competent for them to have given Mr. Nutt the $1,200. See Mr. Selden's letter of 22d February, 1842, from which it appears that Mr. Nutt was appointed to office under the law of 1837, while Messrs. Page and Hedgeman were appointed under the act of 1836. The office and duties of Nutt and those of Page and Hedgeman were totally separate and distinct, and Nutt never was in that subdivision of the Treasury Department created by the act of 1836. By the letters of Mr. Selden and Mr. Randolph all the services rendered by Mr. Nutt were in the Treasury Department proper, as contradistinguished from that ramification of the Treasury Department called the Treasurer's *office.*

It was admitted by the learned Solicitor in argument, and it appears from Mr. Casey's certificate, and in the letters of Mr. Selden and Mr. Randolph, that the office and duties of Mr. Nutt (to whom the increase of two hundred dollars was given) were in the Treasury Department proper; and that he (Nutt) never at any time performed any of the duties of any office in the Treasurer's office. And it appears, from the certificate of Mr. Casey and the letters of Mr. Selden and Mr. Randolph, that Mr. Page and Mr. Hedgeman held and discharged the duties of the office in the Treasurer's office, as stated in their petitions.

It is no objection to either of these claims that no formal demand for the increase of two hundred dollars may never have been made by either. There is no statute of limitation pleadable in bar. Page and Hedgeman might have annually received but five hundred dollars, and left the entire balance due them in the treasury, and at any subsequent time demanded and received such balance.

The duties of the office to which Page was transferred in the Treasurer's office, under the act of 1836, were certain, specific, and well defined; and for the proper discharge of which the said act of 1836 authorized a salary of $1,000 per annum, until the passage of the act of 1842, when said salary was increased to $1,200. Nutt (to whom the increase of $200 was paid) was in the Treasury Department proper, appointed under another law, (act of 1837,) with certain other certain specific and well defined duties assigned to him, with a salary of $1,000 per annum; and the Treasurer (Mr. Selden) asked Congress to increase the salary of Mr. Nutt from $1,000 to $1,200. Congress did not think proper to do so; and, instead of saying the compensation of the clerk in the Treasury Department, authorized by the act of 1837, is increased to $1,200 per annum, said the "compensation of the clerk in the Treasurer's office, authorized by the act of July 2, 1836, is hereby increased to $1,200."

The act of 1836, as well as Mr. Selden, the Treasurer, recognizes the distinction between the Treasury Department proper and the Treasurer's office.

Mr. Selden, Mr. Randolph, and the Solicitor maintain that the office and duties of Mr. Nutt in the Treasury Department proper were more arduous and responsible, and of more value to the government than those of Mr. Page and Mr. Hedgeman in the Treasurer's office; and that, therefore, Mr. Nutt was entitled to the increase of $200, authorized by the act of 1842. But Congress decided otherwise, and left nothing to construction, inference, or implication; and nothing to the discretion of the executive officers of the Treasury Department, but to pay the increase of $200 to Page and Hedgeman.

It is no answer or objection to the claim of Page or Hedgeman that their services might not have been worth ten dollars per annum, and that the services of Mr. Nutt were or might have been worth ten thousand dollars a year.

So long as they (Page and Hedgeman) remained in and discharged the duties of the office, they were entitled to the salary affixed to that office by act of Congress, and at just such time or times as they might think proper to demand or receive it, either in whole or in part. If they thought proper to allow the whole or any portion of their said

salary to remain in the treasury unclaimed for twenty, fifty, or a hundred years, they, their executors, administrators, or assigns, would then be legally entitled to demand and receive it, in the absence of any statute of limitation.

M. THOMPSON,
Attorney for Petitioners.

IN THE COURT OF CLAIMS.

ON THE PETITION OF PAGE.

Brief of the United States Solicitor.

The position of the government in these cases is indicated in my interrogatory to Major Randolph—that is, the court can only discover who was the clerk filling the clerkship, the salary of which was increased by the act of 1842, by the assignment of salary to the clerks in the office by the Secretary of the Treasury. It is contended that Mr. Page's salary was intended to be raised by the act of 1842. I say it was Major Nutt's salary. What is the evidence? It is, that the Secretary assigned the salary to Nutt. Neither of these clerks was appointed to any particular clerkship. The appointment of claimant, here produced, does not name him as clerk under the act of 1836. There is, in fact, no way but the fact of assignment of salary to indicate the law under which an appointment was made. It may be true that till after the act of 1842 it was supposed that Page was appointed under the act of 1836; but if the fact was that after that act of 1842 the salary thereby authorized was conferred on another, it must be intended that that other clerk held under that law.* Nothing said in Selden's letters is inconsistent with this view, or if it was, it is merely a legal opinion. There is no statement made by him inconsistent with the facts stated by Major Randolph. He argues that there was a mistake in not putting the increase on the clerkship created by the act of 1818 instead of that created by the act of 1836; but he does not state that there was any other mode of ascertaining the positions actually filled than by the salary. Major Randolph does state explicitly that there is no other mode. The only question with the accounting officers is, whether the amounts of salary claimed are authorized by the various laws in force. Who are entitled to the particular salaries authorized depends upon the distribution or assignments made by the Secretary of the Treasury.

It is admitted that the Secretary might have removed Page and given the place to Nutt, but it is said he did not do it. If it were conceded that Page filled the clerkship referred to in the act at the date of its passage, the act of the Secretary in assigning the $1,200 salary created by that act would, in effect, be a removal of Page and the appointment of Nutt to that desk. And as both these clerks were appointed in the same general form as clerks in the office of the

* The classification of the clerkships in the Blue Book is by the salaries, not according to the laws creating the clerkships.

Treasurer, it is difficult to conceive of anything more formal being requisite for such a purpose. No new oaths were required. Their desks were not placarded as belonging to a clerk appointed under particular law. What more, therefore, could have been necessary on the part of the Secretary to indicate that Nutt should be deemed to fill the place referred to in the law of 1842 than the assignment to him of the salary given by that law? If it be necessary to suppose a removal of Page and the appointment of Nutt in order to this, what difficulty is there? The courts will intend always that administrative officers, as the Secretary was in this instance, follow the law, if there be no positive repugnance to the law in these acts; so that, if it were necessary to suppose that Page were removed and Nutt appointed, as the secretary had the power to make this removal and appointment, and the effect of what he did in the premises was equivalent thereto, there is surely no difficulty in satisfying even the reasoning of the claimant's counsel on the facts of the case. And the difficulty ought to be less in the case because it is shown by the evidence, and is admitted, indeed, that the claim rests altogether on what is supposed to be a mistake of the committee in putting the increase to a salary which was not asked to be increased, and for which there was no claim or expectations of increase. The Secretary has carried out the law confessedly as it was designed to be. The only question is as to his power to do so. Or that there is no sort of difficulty. He had the power of appointment and of assigning duties and salaries to his clerks; and as we are informed by Major Randolph that there is no way of distinguishing the clerks except by the salaries assigned to them, it follows, necessarily, that Major Nutt, to whom the salary had been assigned, was entitled to it, and not the claimant.

M. BLAIR,
United States Solicitor.

IN THE COURT OF CLAIMS.

WILLIAM B. PAGE'S ADM'R *vs.* THE UNITED STATES.

SCARBURH, J., delivered the opinion of the court.

By the 21st section of the act of Congress of July 22, A. D. 1836, ch. 270, it is provided, "that there shall be employed by the Secretary of the Treasury * * * * three clerks—one at a salary of fourteen hundred dollars per annum, one at a salary of twelve hun red dollars, and one at a salary of one thousand dollars—in the office of the Treasurer of the United States, in lieu of the same number of clerks now employed in the office of the Fifth Auditor of the Treasury in adjusting the accounts of the Post Office Department."—(5 Stat. at L., p 84.)

The clerks appointed under this act were Jonathan Guest, Hopkins Lightner, and William Adams; the first at the salary of $1,400, the second at the salary of $1,200, and the third at the salary of $1,000, therein provided.

William Adams died, and on the 9th day of May, A. D. 1837, William B. Page was appointed his successor.

The act of Congress of August 26, A. D. 1842, ch. 202, provided as follows: "The compensation of the clerk authorized by the act of May twenty-six, eighteen hundred and twenty-four, in the Treasurer's office, is hereby increased to one thousand dollars; and the compensation of the clerk in the same office, authorized by the act of July two, eighteen hundred and thirty-six, is hereby increased to one thousand two hundred dollars."—(5 Stat. at L., p. 523.) The "salary of $1,000, authorized by the act of July 2, 1836, had been and was then [at the passage of the act of 1842] assigned to Mr. Wm. B. Page."—See letter of the Treasurer to the Secretary of the Treasury of August 8, A. D. 1846.)

Prior to the passage of the act of August 26, A. D. 1842, "the sum of $400 had been regularly appropriated for many years consecutively, and by approval of a former Secretary of the Treasury (though without the sanction of any other law than the law making the appropriation) had been divided equally and added to the salaries of two of the clerks of the Treasurer's office proper."—(See the Treasurer's letter above referred to.) The salaries to which these additions were made were (1) that of $1,000, authorized by the act of April 20, A. D. 1818, (3 Stat. at L., p. 446, ch. 88, § 2;) and (2) that of $800, authorized by the act of May 24, A. D. 1824, (4 Stat. at L., p. 41, ch. 157, § 1;) and at the time of the passage of the act of 1842 the former was enjoyed by William D. Nutt, and the latter by Henry Brooks The Treasurer, in a letter to the Secretary of the Treasury, dated February 22, A. D. 1842, said: "Mr. Nutt was first employed in November, 1837, under the treasury note law of that year, and from that time to this has had charge of the issues of treasury notes and the accounts thereof; moreover, during the continuance of the independent treasury system, he had charge of the cash deposited with the Treasurer, officiating as teller and book-keeper, under both circumstances performing duties of the most responsible character." In the same letter the Treasurer said: "At present, and since October, 1836, the other salary of $1,000 has been assigned to Mr. Henry Brooks, who is a recording and copying clerk."

After the passage of the act of 1842, Wm. B. Page continued to receive a salary of $1,000, till the second day of August, A. D. 1845, and the salary of $1,200 allowed by that act was, during that period, paid to William D. Nutt. The petitioner insists that his intestate was by law entitled to the salary of $1,200, and now claims the sum of $584 44, the difference between the salary actually paid him and that to which he was entitled for two years eleven months and ten days, the period intervening between the 26th day of August, A. D. 1842, and the 2d day of August, A. D. 1845.

Under the system which prevailed before the passage of the act of 1853 there was no regular classification of clerks in any of the executive departments, and at no time since the organization of those departments have the duties of clerks been defined by law. Laws have been passed from time to time conferring on the heads of departments the power to employ clerks, limiting their number and

fixing their salaries. The particular duties of each clerk, and the salary which he shall receive, are left to the discretion of the Secretary. There is no clerkship with certain specified duties annexed to it by law. At the time of the passage of the act of 1842 there were eight clerks in the Treasurer's office—one at a salary of $1,700, two at a salary of $1,400 each, one at a salary of $1,150, two at a salary of $1,000 each, one at a salary of $800, and one at a salary of $1,200. The authority to employ them was derived from the acts of April 20, A. D. 1818, May 26, A. D. 1824, and July 2, A. D. 1836. The first act authorized the Secretary of the Treasury to employ "for the office of Treasurer one chief clerk, whose compensation shall not exceed one thousand seven hundered dollars *per annum;* one clerk, whose compensation shall not exceed one thousand four hundred dollars; one clerk, whose compensation shall not exceed one thousand one hundred and fifty dollars; and one clerk, whose compensation shall not exceed one thousand dollars."—(3 Stat. at L., p. 446, ch. 88, § 2.) The second act authorized the Secretary of the Treasury to employ "in the office of the Treasurer one clerk, whose salary shall not exceed the sum of eight hundred dollars."—(4 Stat. at L., p. 41, ch. 178, § 1.) The third act has already been quoted. At the time of the passage of the act of 1842 these were all the acts then in force having a special reference to the clerks in the Treasurer's office. They were in *pari materia*, and constituted one system. Under them the Secretary of the Treasury had unlimited discretion in apportioning the clerical duties of the Treasurer's office amongst the several clerks employed therein, and in the assignment of the several salaries thereby allowed to those clerks, respectively. He was, too, vested with full power to make an arrangement to-day and change it to-morrow, if he deemed it expedient. His own convictions of duty were the law on this subject, because the management of it was left to his discretion. If any clerk felt himself aggrieved by his acts in the premises in assigning him duties which he ought not to be required to perform, or salary of inferior grade, when in justice he ought to be allowed a higher one, his only remedy was to resign his office.

After the passage of the act of 1842 the Secretary of the Treasury had full authority to determine to what duties the salary of $1,200 thereby allowed should be annexed, and to designate the clerk by whom those duties should be performed. It was in his power to have decided that the salary of $1,000, allowed by the act of 1818, should thereafter be annexed to the duties performed by Mr. Page, and that the salary of $1,200, allowed by the act of 1842, should thereafter be annexed to the duties performed by Mr. Nutt. If he did so decide, so long as his decision continued unchanged, the effect was the same as if it had been written in the acts of Congress. What did he decide? There is no specific proof of any actual decision made by him. There is no record which shows that, in consideration of the premises, he made any express order whatever. But the law prescribed no form in which he should act. It imposed the duty, but left the mode of performing it to the Secretary's discretion. What he did, therefore, is a mere fact, and must be shown by evidence like any

other fact. The evidence is, that from the passage of the act of 1842, till the 2d day of August, A. D. 1845, a period of more than two years and eleven months, Mr. Page was paid a salary of $1,000, and Mr. Nutt a salary of $1,200 a year; and that Mr. Page did not, at any time, either before or after the passage of that act, receive a salary of $1,200 a year. The clerks are paid monthly. On thirty-five different occasions, therefore, payments were made to Mr. Page, on account of his salary, at the rate of $1,000 a year, and they were received by him without objection on his part. In the case of an ordinary contract, it would be presumed that these payments were made in pursuance thereof, and that nothing more was due. If this were an ordinary transaction between man and man, the case, for example, of a clerk in a regular mercantile establishment, there could be no difficulty in inferring from the circumstances a contract between the parties for the services of the clerk at a salary of $1,000. In this case, as well as in that, the salary could only be determined by the mutual consent of the parties, the sole difference being that, in that case, it would be unlimited in amount, whilst in this it would be subject to the limitations fixed by law. With this exception, the salary would depend on the mutual consent of the parties as much in the one case as in other. There can be no doubt that the Secretary had full authority, with the consent of Mr. Page, to employ him at any one of the salaries allowed to clerks in the Treasurer's office. Hence, it seems to us to be as presumable in this case as in the case supposed, that the clerk received all that he was entitled to. The circumstances of this case admit of no other conclusion than that, after the passage of the act of 1842, the Secretary of the Treasury determined, in the exercise of the authority vested in him by law, to annex to the duties performed by Mr. Page one of the salaries of $1,000 each, above mentioned, and that he (Mr. Page) was thereafter employed as a clerk in the Treasurer's office at that salary.

The petitioner has proceeded upon the hypothesis that the act of 1836 created an office, with certain specific duties pertaining to it, at the salary of $1,000 a year; that his intestate was appointed to fill it; and that he continued to hold it till the 2d day of August, A. D. 1845. That the act of 1836 created an office and provided a salary for it, may be true; and it may also be true that the petitioner was appointed to fill it.* But the duties of this office—if it were an office—were not prescribed by law. These were left to the discretion of the Secretary of the Treasury. The act of 1836 was a mere authority to the Secretary to increase the clerical force in the Treasurer's office. It so added to his powers in this respect, that thereafter he was required to employ eight clerks in that office, at the salaries prescribed by the several acts of Congress relating thereto. But the duties to be performed, and by whom, and the person to whom any particular salary was to be assigned, were left undetermined by the law. The salary in each case was determined between the Secretary and the clerk employed—by an offer on the one part, and an acceptance on the other. This constituted his appointment. No commission was issued, and he

*NOTE.—The court does not decide that a clerk is an officer.

was employed for no specified term. He might be employed at one salary at first, and immediately afterwards at a less or a greater salary, as might be determined by the Secretary. If he did not choose to accept the salary offered by the Secretary, he could decline it, as he could decline an offer of employment made to him by a private individual. But, if he accepted it, then he was employed at that salary, and could claim nothing more. Hence, it was very forcibly argued by the Solicitor, that the salary received by a clerk indicates the act under which he was employed. Hence, too, Wm. B. Randolph, in his letter to the Solicitor of February 7, A. D. 1857, which is by consent read as evidence in this case, very pertinently and properly remarks: "The act of 1842 increased to $1,200 the pay of a clerkship authorized by the act of 1836 at $1,000, thus creating a new rate of salary, which was assigned and paid to Wm. D. Nutt, *who then became virtually employed under the act of* 1836, *modified by the act of* 1842." Mr. Nutt then became not only virtually, but *actually* employed "under the act of 1836, modified by the act of 1842," because the Secretary, who had lawful authority to do so, had offered him the salary thereby provided, and he had accepted it. This constituted a new employment of Mr. Nutt, notwithstanding he may have continued to perform precisely the same duties as before. It is in relation to this point that the petitioner's hypothesis is erroneous. He has wholly misunderstood the nature of a clerk's employment, and the powers and duties of the Secretary in relation thereto. Although his intestate may have been appointed under the act of 1836, yet the evidence forces us to the conclusion that his employment under that act ceased immediately after the passage of the act of 1842; and that, thereafter, he was employed under one of the acts which allowed a salary of only $1,000 a year.

We are of the opinion that the petitioner is not entitled to relief.

35TH CONGRESS, 1st Session } SENATE. { MIS. DOC. No. 52.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER, 18, 1857.—Referred to the Committee on Claims.
JUNE 14, 1858.—Committee discharged.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of

ALEXANDER H. COOK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Deposition offered in proof by claimant, transmitted to the House of Representatives.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, *Washington County.*

To the honorable the Judges of the United States Court of Claims:

The petition of Alexander H. Cook, a resident citizen of Texas, would, with respect, represent unto your honors that—

In the autumn of the year 1832 your petitioner, then a citizen of the United States, was engaged in the mercantile trade at Matamoras, in the repulic of Mexico, under a *passport* issued to him as a citizen of the United States by the Mexican consul in New Orleans. On or about the 1st of September, 1835, he commenced trading at Demitt's

landing, a Mexican trading post, within the limits of the republic of Mexico, and on the west side of the Lavava river, about seven miles from its mouth, and continued to trade there until the 20th of March, 1836. During this time your petitioner was protected as a citizen of the United States by a general passport issued directly from the authorities of Mexico, as also by the provisions of the third, seventh, thirteenth, fourteenth, and fifteenth articles of the treaty of 1831, between the United States of America and the said republic of Mexico, which articles are as follows:

ARTICLE III.

The citizens of the two countries, respectively, shall have liberty freely and securely to come with their vessels and cargoes to all such places, ports, and rivers of the United States of America, and of the United Mexican States, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any part of the said territories, respectively; also, to hire and occupy hands and warehouses for the purpose of their commerce, and to trade therein in all sorts of produce, manufactures, and merchandise; and generally the merchants and traders of each nation shall enjoy the most complete protection and security for their commerce; and they shall not pay higher or other duties, impost, or fees whatsoever, than those of the most favored nations are or may be obliged to pay, and shall enjoy all the rights, privileges, and exemptions, with respect to navigation and commerce, which the citizens of the most favored nations do or may enjoy; but subject always to the laws, usages, and statutes of the two countries, respectively. The liberty to enter and discharge the vessels of both nations of which this article treats, shall not be understood to authorize the coasting trade, which is permitted to national vessels only.

ARTICLE VII.

All merchants, captains, or commanders of vessels of other citizens of the United States of America shall have full liberty in the United Mexican States to direct or manage themselves their own affairs, or to commit them to the management of whomsoever they may think proper, either as broker, factor, agent, or interpreter; nor shall they be obliged to employ for the aforesaid purposes any other persons than those employed by Mexicans, nor to pay them higher salaries or remuneration than such as are in like cases paid by Mexicans; and absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares, or merchandise imported into or exported from the United Mexican States, as they may think proper, observing the laws, usages, and customs of the country. The citizens of Mexico shall enjoy the same privileges in the States and Territories of the United States of America, being subject to the same conditions.

ARTICLE XIII.

In whatever relates to the succession of personal estates, (either by will or ab intestato,) and the right of disposal of such property, of

whatever sort or denomination it may be, by sale, donation, exchange, or testament, or in any other manner whatsoever, the citizens of the two contracting parties shall enjoy, in their respective States and Territories, the privileges, exemptions, liberties, and rights as native citizens, and shall not be charged, in any of these respects, with other or higher duties of impost than those which are now or may hereafter be paid by citizens of the power in whose territories they may reside.

ARTICLE XIV.

Both of the contracting parties promise and engage to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in these territories subject to the jurisdiction of the one or of the other, transient or dwelling there, in leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the native citizens of the country in which they may be; for which they may employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper in all of their trials at law; and the citizens of either party, or their agent, shall enjoy in every respect the same rights and privileges, either in prosecuting or defending their rights of person or property, as the citizens of the country where the cause may be tried.

ARTICLE XV.

The citizens of the United States of America, residing in the United Mexican States, shall enjoy, in their houses, persons, and properties, the protection of the government, with the most perfect security and liberty of conscience, so long as they respect the constitution, &c.

Your petitioner, deeming himself amply protected by the said treaty, and with his passport as an American citizen, proceeded to purchase a stock of dry goods and groceries in the city of New Orleans, in the month of August, 1835, at a cost of upwards of $3,000 in cash, and shipped the same by the schooner William Robbins, Captain Bobbins, of Baltimore, to Lavaca bay, from whence they were carried to Demitt's landing. Afterwards, to wit, during the winter of 1835–'36, he increased his stock of merchandise by purchases from one Dasher, then of Demitt's landing, and again in the month of March by other purchases from Shreve and Grayson, then of Matagorda, Texas, amounting to over $2,000 in value at the places where purchased. Petitioner then alleges that on the 20th day of March, 1836, his stock of goods at Demitt's landing was worth at first cost, including transportation, not less than $5,000, and that they were then and there worth to petitioner one hundred per cent. advance, or $10,000.

Petitioner would further allege that, in the said month of March, 1836, a large body of Mexican troops were ordered into Texas to suppress a rebellion which then threatened to break out in that State of the Mexican republic. The approach of these troops towards Demitt's landing was announced to your petitioner on the 20th day of March,

1836, with the other fearful announcement that the Alamo had fallen and her defenders put to the sword, and that several hundered men under Colonel Fannin, who had surrendered to the Mexican forces, had all been massacred in cold blood. These tales of horror and bloodshed struck terror in the hearts of the ten or dozen persons left at Demitt's landing, and who had remained there quietly and peacefully attending to their matters of trade, and fully protected, as your petitioner supposed, under the treaty stipulations of 1831. They, too, fled as a division of the Mexican troops, under the immediate command of General Urrea, approached the trading post. Petitioner would here distinctly aver that he never participated in any way in the revolutionary movements of Texas, but maintained a strict neutrality, and acted in good faith towards the republic of Mexico; that he was at all times a citizen of the United States, and has never been a citizen of any other State or republic; that when he fled from Demitt's landing, on the approach of the Mexican forces, he took passage on a vessel happening to be lying in Matagorda bay, and returned to the United States, landing at New Orleans.

Before leaving Demitt's landing, your petitioner concealed in a well a dozen boxes of his goods, and then, taking all the money he had, about $300, left his whole stock to the mercy of the Mexican army. Petitioner is informed, and believes, that General Urrea sent carts from Victoria with which to carry off the public stores and private property found at Demitt's landing; and petitioner alleges that the said Mexican army, under the immediate orders, control, and command of General Urrea, did despoil him of his said stock of merchandise, and seize and carry off the whole of same, amounting, as aforesaid, to $10,000 and upwards; and the said army did, by the direct orders of the said General Urrea, seize, use, and appropriate your petitioner's goods to the use and benefit of the said republic of Mexico, in violation of his rights as an American citizen, and in gross violation of the articles of the treaty of 1831, as before mentioned, and to the damage of your petitioner in the sum of fifty thousand dollars.

Petitioner further alleges that, on the 2d day of February, 1848, another treaty was negotiated between the United States and the said republic of Mexico, a copy of which is hereto annexed, and prayed to be taken as a part of this treaty, which, among other things, provides:

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever may be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and

considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same to an amount not exceeding three and one-quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established, &c., &c.

On the 3d of March, 1849, the Congress of the United States passed an act entitled "An act to carry into effect certain stipulations of the treaty between the United States and the republic of Mexico, of 2d day of February, 1848," in words as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States, by and with the advice and consent of the Senate, shall appoint three persons, who shall constitute a board of commissioners, to meet at the city of Washington, at some early day to be designated by the President, whose duty it shall be to receive and examine all claims of citizens of the United States upon the republic of Mexico, which are provided for in the treaty between said governments of the United States and Mexico, concluded on the 2d day of February, 1848, and which may be presented to the said board of commissioners, and to decide thereon according to the provisions of the said treaty, and of the first and fifth articles of the unratified convention, concluded at the city of Mexico on the 20th day of November, 1843.

SEC. 2. *And be it further enacted*, That the said board of commissioners shall have a secretary in the English and Spanish languages, to be appointed by the President, with the advice of the Senate; and said board is hereby authorized to appoint a clerk and make all needful rules and regulations, not contrary to the laws of the United States or the provisions of said treaty, for carrying their said commissions into full effect.

SEC. 3. *And be it further enacted*, That all records and documents and papers as hereafter, until the close of said commission, may come into the possession of said Department of State, having relations to said claims, shall be delivered to said board; and when the said commission shall be concluded, the journals of its proceedings, together with all of the records, documents, and papers which shall have come into its possession relative to the business of said board, shall be deposited in the office of the Secretary of State, and the period of one year from and after the organization of said board is hereby designated within which said commissioners may, at the instance of any claimant or claimants, apply through the Secretary of State of the United States to the Mexican minister of foreign affairs for all such books, records, or documents in the possession or power of the Mexican government as shall be deemed necessary to the just decision of any claim or claims submitted to said board in conformity with said treaty.

SEC. 4. *And be it further enacted*, That the Secretary of State is required, as soon as the President shall have designated the day for the meeting of the said board, to give public notice thereof, and to

cause said notice to be published in such newspapers as are authorized to publish the laws of the United States.

SEC. 5. *And be it further enacted*, &c.—

Each commissioner to have $3,000 a year.—(This section fixes the amount to be paid officers.)

SEC. 6. *And be it further enacted*, &c.—

Commissioners shall report to the Secretary of State a list of all of the several awards made by them; a certified copy thereof shall be by him transmitted to the Secretary of the Treasury, who shall thereupon distribute in ratable proportion, among the persons in whose favor the award shall have been made, the amount stipulated in the 15th article of said treaty, (being three and one-fourth millions of dollars,) according to the proportions which their respective awards shall bear to the said three and one-fourth millions of dollars, first deducting such sums of money as may be due the United States from said persons in whose favor said awards shall be made; and the said Secretary shall thereupon cause certificates of stock of the United States to issue, or pay the same in money, at their option.

SEC. 7. Said board shall terminate its business in two years from its organization.

SEC. 8. In all cases arising under this act where any person or persons, other than those in whose favor an award has been or may be made, shall claim the amount so awarded, or any part thereof, and shall, within thirty days from the passage of this act, or from the date of the said award, notify the Secretary of the Treasury of his, her, or their intention to contest the payment of the same as awarded, and shall file with the district attorney of the United States a bond, with security, for payment of costs and damages arising therefrom, the amount so awarded, and the payment of which is contested as aforesaid, shall be retained in the treasury of the United States, subject to the decisions of the courts of the United States thereon; and thereupon the said party so claiming the sum so awarded, or any part thereof, shall be at liberty to file his bill for relief and injunction in the circuit court of the District of Columbia, upon the principles which govern courts of equity, and any injunction thereupon granted by the court shall be respected by the Treasury Department; and the said case in equity shall thereupon be conducted and governed, in all respects, as in other cases in equity.

SEC. 9. To take effect from and after the 10th March, 1849.

Approved 3d March, 1849.

Under the direction and by the authority of this law, your petitioner filed with the board of commissioners appointed under said act his memorial, setting forth the preceding facts, and praying compensation for the loss of his goods to the amount of $10,000, with legal interest thereon from the 20th day of March, 1836, to the date of the application to the said board of commissioners, and the further sum of $15,000 as damages for the heavy losses he sustained in being thus broken up and thrown out of a profitable trade. Said memorial was filed on the 6th day of November, 1849, and after being considered by the board, your petitioner's claim was disallowed, on the ground that

he was not a citizen of the United States at the time he was despoiled and robbed of his property by the Mexican army.

Your petitioner alleges that, by virtue of the said treaty of 1848, and the act of Congress carrying out the same, the government of the United States is obligated to pay your petitioner the said sum of $10,000, with interest and damages as aforesaid; and therefore he prays your honorable court, after due proceedings had in the premises, to prepare and report a bill to Congress, appropriating to him the said sum of $10,000, with interest on the same, and the further sum of $15,000 damages as aforesaid; and, as in duty bound, your petitioner will ever pray, &c.

A. H. EVANS,
Attorney for Claimant.

ALEXANDER H. COOK *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court.

The petitioner alleges that, in the autumn of the year 1832, being then a citizen of the United States, he was a merchant at Matamoras, in Mexico, under a passport issued to him as a citizen of the United States by the Mexican consul in New Orleans. About the 1st September, 1835, he commenced trading at Demitt's landing, a trading post within the limits of Mexico, and on the west side of the Lavaca river, about seven miles from its mouth, and continued to trade there until the 20th of March, 1836. He alleges that during this time he was protected as a citizen of the United States by a general passport issued directly from the authorities of Mexico, as also by the provisions of the third, seventh, thirteenth, fourteenth, and fifteenth articles of the treaty of 1831 between the United States and Mexico.

The articles of this treaty provide that the citizens of the two countries, respectively, shall be permitted to reside in any part of the said countries and shall enjoy the most complete protection and security for their commerce, and that the citizens of the United States residing in Mexico shall enjoy, in their houses, persons, and properties, the protection of the government, with the most perfect security and liberty of conscience, so long as they respect the constitution, &c.

The claimant then alleges that he purchased a stock of dry goods and groceries in New Orleans, which afterwards was carried to Demitt's landing. In the winter of 1835–'36 he purchased a further stock of goods, which was deposited likewise at Demitt's landing; and on the 20th day of March, 1836, the goods were worth to him ten thousand dollars.

On the 20th day of March, aforesaid, the Mexican troops were ordered into Texas, and approached Demitt's landing. The claimant alleges that he was in no way connected with the revolutionary movements in Texas, but maintained a strict neutrality; that he fled from Demitt's landing on the approach of the Mexican forces, and returned to the United States, landing at New Orleans, and left his whole stock

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 53.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOSHUA R. JEWETT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents received from the House of Representatives and returned to that House.
3. Claimant's brief.
4. Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The petition of Joshua R. Jewett, of Granby, in the county of Hartford, in the State of Connecticut, begs leave respectfully to represent unto this honorable Court, that he and his brother, Josiah Jewett, are interested as surviving children of Joseph Jewett, deceased, in a claim which the said Joseph Jewett had against the United States for services in the revolutionary war; that their interest in said claim arises from the consideration that they are the surviving children and heirs-at-law of the said Joseph Jewett, who died intes-

tate on or about the 31st day of August, A. D. 1776; and in consideration of certain resolves of Congress hereinafter named.

And your petitioner further represents that the said Joseph Jewett was commissioned by Congress a captain, A. D. 1775, in the continental service, in the revolutionary war, and served as such officer until his death, as aforesaid; that by a resoluion of Congress, of the 24th day of August, 1780, it was provided that the resolution of the 15th of May, 1778, granting half-pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or should thereafter die in the service; to commence from the time of such officer's death and continue for the term of seven years; or, if there should be no widow, or in case of her death or intermarriage, the said half-pay should be given to the orphan children of the officer so dying as aforesaid, if he should have left any, &c. And your petitioner avers that the said Joseph Jewett and brother died when in the service before the end of the war, and at the time above stated, leaving a wife and children him surviving, but who are now dead, leaving issue, your petitioner.

And your petitioner further show to this Court, that the seven years half-pay provided for in the foregoing resolution, nor the land promised by resolution of September 16, 1776, has never been paid, but remains as a debt or claim due to the estate or representatives of the said officer from the United States.

Your petitioner therefore prays that this honorable Court will examine into the justice and equity of said claim, and report a bill to Congress for the payment thereof, with interest, unto the legal representatives of the said officer, or such other bill as shall seem order a fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

JOSHUA R. JEWETT.

Dated JULY 12, A. D. 1856.

STATE OF CONNECTICUT, }
County of Hartford, } *ss.*

Joshua R. Jewett, of Granby, in the county of Hartford, in the State of Connecticut, being duly sworn, doth depose and say, tha the petition above, by him subscribed, contains the truth according to the best of his knowledge, information and belief.

JOSHUA R. JEWETT,

Sworn and subscribed before me, this 12th day of July, A. D. 1856.

JOHN H. CASE,
Commissioner Superior Court Hartford County.

IN THE COURT OF CLAIMS.

JOSHUA R. JEWETT and other claimants, *vs.* THE UNITED STATES. } Claimants' brief and points.

1. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo & Moulton's "Pension and Bounty Lands," 3; resolution of August 24, 1780, ib. 6; resolution October 21, 1780. ib. 7; resolution March 22, 1783, section 2, ib. 9; resolution March 8, 1785, ib. 10.) Ib. in the introduction, pages 21–42.

2. The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson and Lieutenant Price's case, in October, for the relief of, March 2, 1833, Mayo and Moulton, 180; Lieutenant Wilson's case, act February 27, 1833, his heirs allowed seven years' half-pay, with interest; per resolution of Congress, August 24, 1780, ib. 175.

Doctor Axson's case, act June 15, 1832; commutation with interest, ib. 163.

Captain McDuff's case, act April 2, 1830, section 2; land given him, the same as to other captains in the continental line, ib. 148.

Lieutenant Jacob's case, act July 14, 1832; commutation and interest allowed him, ib. 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832; commutation and interest allowed to heirs, ib. 168.

Colonel Thornton's case, act February 9, 1833; commutation and interest to administrators, one-fourth to widow, and residue distributed to persons entitled according to the laws of Virginia, ib. 173.

John Thomas and Peter Foster's cases, act March 2, 1833; commutation and interest as officers, ib. 178.

Richard Henley, court's case, act March 2, 1833; commutation to his widow, and interest, ib. 178.

Captain Triplit's case, act March 2, 1833; commutation and interest, ib. 179.

C. K. AVERILL, *Attorney for claimants.*

IN THE COURT OF CLAIMS.—No. 652.

JOSHUA R. JEWETT *vs.* THE UNITED STATES.

Brief of United States Solicitor.

The petitioner describes himself as one of the surviving children of Joseph Jewett, who, it is alleged, was a captain in the continental service, and served as such until slain by the enemy, August 31, 1776.

I. The petitioner, for himself and brother, claims the seven years' half-pay promised by the resolutions of May 15, 1778, and August 24, 1780, to the widows and children of those officers who had died in the continental service.

1. The half-pay promised by resolution of August, 1780, would, if due at all, have gone to the widow, (who is admitted to have long survived her husband,) subject to be divested by her marriage; and the evidence does not show that she was married before 1790. The whole seven years' half-pay must then have vested in her; and the petitioners allege no privity between them and her. They do not allege that they are her children. Her executors or children only can claim under the act of June 19, 1840.

2. It is barred by limitation, and resolutions of the continental Congress, of November 2, 1785, and July 23, 1787, as construed by the act of March 23, 1792, sec. 1, (1 Stat., 243;) and by the act of February 12, 1793, (1 Stat. 301.)

3. There is no evidence that the ancestor of these petitioners was one of those "commissioned by Congress," to which class only the promises of the resolutions applied. The evidence goes to show that he was in a militia regiment, raised by the State of Connecticut, for one year.

4. The resolution of August, 1780, requested the several States to make provision for paying the half-pay to the widows and orphans entitled, and to charge the same to the United States. Connecticut, to which State Jewett belonged, made many payments under this resolution.—(See Am. State Papers, Claims, pp. 70, 72, cited for petitioner.) If that State, as alleged, failed to pay in this case, it affords, without explanation, a strong presumption against the claim.

II. The petitioner also claims bounty land under the resolution of September 16, 1776.

1. That resolution was prospective only in its operation, and the officer died before its passage.

2. It applied only to those who were on continental establishment, and it is not shown that this officer was in continental service.

3. It applied only to officers who should engage, or had engaged, for the war; and this officer was engaged for one year only —(See resolutions cited by petitioner, and regulations of Pension Office, Form 36, Mayo and Moulton's Pension Laws, p. 601.)

4. The Department of the Interior has authority under the act of February 8, 1854, (10 Stat., 267,) to adjust revolutionary bounty land claims, and the claim should be presented there before being prosecuted before this court. It was not the object of the act constituting this court, to assign it any portion of the ordinary duties of the executive departments.

III. The evidence offered is in great part inadmissible under the rules of this court.

JOHN D. McPHERSON,
Deputy Solicitor Court of Claims.

JOSHUA R. JEWETT *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The claimant presents his petition as one of the two surviving children and heirs of Captain Joseph Jewett, deceased. The petition states that said Joseph Jewett was commissioned by Congress a captain in the army of the revolution in the year 1775; that he died in the service on or about the 31st of August, 1776, leaving a widow and several children; that the widow is dead, and the children, with the exception of the claimant and one brother, are dead also.

There are two claims set out in the petition, which are both founded on the services of said Joseph Jewett as a captain in the army of the revolution.

The first of these claims is for bounty land; and the second, for seven years' half-pay of a captain in the army.

In support of the claim for bounty land, the claimant refers to the following resolutions of the old Congress:

"*Resolved*, That eighty-eight battalions be enlisted as soon as possible, to serve during the present war, and that each State furnish their respective quotas in the following proportions, viz:" &c.; "that Congress make provision for granting lands in the following proportions: To the officers and soldiers who shall so engage in the service and continue therein to the close of the war, or until discharged by Congress, and to the representatives of such officers and soldiers as shall be slain by the enemy," &c.—(Resolution of September 16, 1776, 1 Jour. old Cong., 476.)

"*Resolved*, That the bounty and grants of land offered by Congress by a resolution of the 16th instant, as an encouragement to the officers and soldiers to engage to serve in the army of the United States during the war, shall extend to all who are or shall be enlisted for that term."—(Resolution of September 18, 1776, 1 Jour. supra, 479.)

To obtain the bounty land now sued for, the first thing to be proved was, that said Joseph Jewett was a captain, on continental establishment, in the revolutionary army, and that he was engaged to serve *during the war*.

The evidence on this subject consists of some *ex parte* affidavits taken by the claimant in Connecticut in 1849, the claimant's own affidavit made in 1850, and two certified copies of entries in books in the comptroller's office at Hartford, Conn. The above mentioned evidence was introduced by the claimant.

It may be considered, though no commission is shown, that said Joseph Jewett was a captain in actual service at the time of his death. The evidence above referred to, as relates to his office, is as follows:

The claimant's affidavit states that his father, Joseph Jewett, late of the town of Lyme, county of New London, State of Connecticut, was a captain in the army of the revolution; that he marched with his company to Roxbury, at the time of the Lexington alarm, as would appear from records and affidavits accompanying this applica[illegible] that he was again commissioned as a captain of the 8th c[illegible]

the 8th regiment, and marched to Boston to join the American forces at that place, and again joined the army as a captain of said company and regiment under the command of Colonel Jedediah Huntington; that he, Captain Jewett, marched with Colonel Huntington to Long Island, and at the battle on the 27th of August, 1776, was taken prisoner, and, upon refusing to deliver up his watch, was mortally wounded by a British officer, and died of the wound on the 31st of that month.

Nathan Jewett's affidavit says that the affiant well knew that his uncle, Captain Joseph Jewett, was in the war of the revolution as a captain in the continental line in Huntington's regiment; that he went to Roxbury, in Massachusetts, at the breaking out of the war as an officer in the militia; and that in July, 1775, he was persuaded, while in Roxbury or Boston, to give up his command in the militia and accept of a commission as a captain in the continental line, and that he continued in the service until his death in August, 1776.

Oliver Raymond's affidavit states that he could recollect some of the incidents of the revolutionary war, and among those incidents was the death of Captain Joseph Jewett, who was a captain in Huntington's regiment, and who was killed at the battle on Long Island by a British officer for refusing to give up his watch when demanded, after having delivered up his sword.

One of said certificates of entries in the comptroller's books at Hartford states that Captain Jewett's name is in a pay-roll headed "Marched from Lyme for the relief of Boston, &c., in the Lexington alarm, April, 1775;" and opposite his name are the following entries, viz: "Captain, number of days in service 31," &c. This extract also states that the name of Captain Jewett is in "A pay-roll of the 8th company of the 8th regiment raised per order of the General Assembly, Colony Connecticut, July, A. D. 1775."

The other certificate is as follows:

STATE OF CONNECTICUT, COMPTROLLER'S OFFICE,
Hartford, December 29, 1849.

"I certify that upon application for further evidence of the service of Captain Joseph Jewett in the war of the revolution, I have examined the books & documents remaining in this office, and find as follows, viz: 1st. In a ledger of the Pay Table Office under the following heading, 'Col. Jeded'h Huntington, Reg't rais'd Jan'y, 1776, for one year,' appears the name of 'Capt. Joseph Jewett,' and opposite said name are the following entries, viz: Arms & Baggage taken or destroyed £23, Total £23. 2d. The entry of the above is in the Day Book as follows, viz: United States, Dr. To order on treas'r Capt. Jos. Jewett, for loss, Huntington's Batt'l '76, £23."

"ABIJAH CATLIN, *Comptroller*,
"By GEO. ROBINSON, *Clerk*."

It is clear, therefore, according to the claimant's evidence, that Captain Jewett was not engaged to serve in the continental army *during the war*. He belonged to Huntington's regiment, raised in Connecticut in January, 1776, which regiment was to serve *for one year*.

This case, therefore, is not embraced in the resolutions of the 16th and 18th of September, 1776, above referred to, and on which the present claim is founded.

This claim for bounty land appears not to be embraced in said resolutions of September, 1776, for another reason, and that is, that the captain was killed *before* the passage of those resolutions, which are prospective only. The expression to be construed is, "to the representatives of such officers and soldiers as shall be slain by the enemy." That expression applies not to past, but to future cases only. It is said that in the case of Colonel Knowlton, who was killed on the 15th of September, 1776, the bounty land was refused, as the resolution relied on was not passed till the next day after his death.—(American State Papers, title "Claims," p. 848.) In 1838 a bill was introduced into one of the houses of Congress providing for the heirs of the officers and soldiers who were killed *before* the 16th of September, 1776, but the bill does not appear to have become a law.—(Rev. Book, 402.)

There is another ground upon which this petition for bounty land must be refused. It is not shown that application has been made to the proper executive department for the bounty land in question. Before we can take jurisdiction of such a case as this, it must appear that the bounty land had been applied for at such department as aforesaid, and that the application had been refused.

There are statutes of limitations as to applications for bounty land, but the time limited for such applications has been extended from time to time by Congress. By the act of 1854, the time was extended for five years, from the 26th of June, 1853.—(10 Stat. at Large, 267.)

It may be proper also to mention, that the only application which appears to have been anywhere made for the bounty land in question, before the filing of the present petition, was made to Congress after a lapse of more than sixty years after the claim is allsged to have accrued; and no satisfactory cause is shown for the delay.

We now come to the examination of the claim for the half-pay for seven years from the death of Captain Jewett.

The claimant, in support of this claim, refers to the following resolutions:

"*Resolved, unanimously*, That all military officers commissioned by Congress, who now are or hereafter may be in the service of the United States, and shall continue therein during the war * * * shall, after the conclusion of war, be entitled to receive annually, for the term of seven years, if they live so long, one-half of the presnt pay of such officers, &c."—(Res. May 15, 1778, 2 Journals Old Con., 554.)

"*Resolved*, That the resolution of the 15th day of May, 1778, granting half-pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or shall hereafter die in the service, to commence from the time of such officer's death, and continue for the term of seven years; or if there be no widow, or in case of her death or intermarriage, the said half-pay to be given to orphan children of the officer dying as aforesaid, if he shall h

any; and that it be recommended to the legislatures of the respective States to which such officers belong, to make provision for paying the same on account of the United States."—(Res. Aug. 4, 1780, 3 Jour. Old Cong., 512.)

The present is a claim for the seven years' half-pay, alleged to be due under the two resolutions last above mentioned. It is unnecessary to inquire whether, were this claim recoverable, the present claimant has any interest in it. Indeed, as the time of the widow's second marriage is not proved, we have not the means to determine the question of ownership. The only demand that appears to have been made by any person for the claim before the present petition was filed, was the presenting of a petition to Congress in 1850, by the present claimant. At that time more than sixty years had elapsed from the time when the claim is alleged to have accrued.

This claim for half-pay for seven years is barred by a resolution of Congress of the 2d of November, 1785, (4 Journ. Old Cong., 603.) There is also the following act of Congress of the 12th of February, 1793:

"*Be it enacted, &c.*, That all claims upon the United States for services or supplies, or for other cause, matter, or thing, furnished or done previous to the 4th day of Mareh, 1789, whether founded upon certificates, or written documents from public officers, or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the 1st day of May, 1794, shall forever after be barred and precluded from settlement or allowance: provided, &c. (The provisoes do not affect this case.)—(1 Stat. at Large, 301.)

We are of opinion that the claimant has no right to recover either of the demands described in the petition.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 54.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ABRAHAM KING, ADMISTRATOR OF MANDEVILLE, *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Documents in the case referred to the Court of Claims by the House of Representatives and returned to that House.
3. Other documents exhibited as proof in the case by the claimants.
4. Claimant's brief.
5. Assistant solicitor's brief.
6. Opinions of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The petition of Abraham King, administrator of the estate of John Mandeville, for the benefit of Joshua Mandeville and Mary King, surviving children of John Mandeville, late of Peekskill, in the State of New York, in their own behalf, as well as in behalf of the grandchildren and heirs-at-law of the said John Mandeville, who are the owners of

the claim herein named as heirs-at-law and not by purchase, begs leave respectfully to represent and show that the said John Mandeville was, on the 4th day of October, 1777, the owner of a large frame dwelling house, used as an inn, together with a barn, carriage house and sheds at Peekskill aforesaid, which was taken possession of by the agents of the United States under the orders or direction of Generals Putnam, Dougal, Huntington, &c., officers under their command or some one of them, and occupied and used said dwelling house as headquarters, and the barn, carriage house and sheds for the reception of their baggage, ammunition and provisions, and held courtsmartial there; that while so occupied, the British forces ascended the Hudson river and landed at Peekskill, drove out the Americans, and burned the buildings aforesaid, to the value of three thousand five hundred dollars, which your petitioner claims has never been paid, and claims a right to be paid for said losses, and to be paid the interest on said claim, for the withholding of the payment of the said claim which was reasonable.

And they further aver and state, that they made application to Congress for the payment of said claim, and two reports were made, one in 1838, and the other in 1848, in favor of said claim, the latter report accompanied by a bill, which was read twice and committed to a committee of the whole House; also, that in 1855, the same being on the private calendar of the House, was referred to the Court of Claims. All of which proceedings they ask to be filed in this Court and made a part of their case.

Your petitioner therefore prays that this honorable Court will examine into the justice and equity of said claim, and report a bill to Congress for the payment thereof, with interest, unto the legal representatives of the said John Mandeville, or such other order or bill as shall seem fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

C. K. AVERILL,
Attorney for Claimants.

Dated February 20, A. D. 1856.

STATE OF NEW YORK, }
County of Clinton, } *ss.*

Calvin K. Averill, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say, that the petition above, by him subscribed, contains the truth according to the best of his knowledge, information and belief.

C. K. AVERILL.

Sworn and subscribed before me, this 20th day of February, A. D. 1856.

M. VAN DERVORT,
Justice of the Peace.

IN COURT OF CLAIMS.

JOSHUA MANDEVILLE and others, Claimants, *vs.* THE UNITED STATES.	Claimants' points and brief.

I. This claim is for the value of a dwelling house and out houses destroyed by the enemy during the revolutionary war, in consequence of their occupation by the American troops. The proof is, that John Mandeville was the owner of said property, and the dwelling house was used by said Mandeville as an inn, in the year 1777, at Peekskill, New York; that the American army, under General Putnam, encamped on said Mandeville's plantation, and took possession of and occupied the said dwelling house as headquarters, and the barn, carriage house, and sheds for the reception of their baggage, ammunition, and provisions, and placed their sentinels around them night and day; one of the rooms was appropriated as an office for the paymaster, and another for holding courts-martial. That on the 4th of October, 1777, the enemy landed in force, before whom General Putnam retired to the heights, and the enemy destroyed the buildings occupied by our troops, valued at $3,500.

II. The amendments to the Constitution, article 5, provides that private property shall not be taken for public use without just compensation. The use in this case invited aggression, which resulted in its destruction. The just compensation is the value of the premises destroyed, with interest from the time the *claim* has been withheld or become due.—(See "Compend., &c., on Revolutionary Claims, Document No. 42, for 1837-'38.")

III. The merits as well as the validity of this claim has been twice passed on in Congress favorably and bills reported.—(See House report No. 470, 2d session 25th Congress. Also, House report No. 675, 1st session 30th Congress, accompanied by bill 539, which is now referred to this court.)

IV. It is the duty of government, imposed upon it by the law of nations as well as public policy, to protect, by proper indemnity, its citizens from the acts of its enemies in time of public war, and from its own agents. Congress has repeatedly, in cases too numerous to name, under like circumstances, granted indemnity in the war of the revolution and in the war of 1812.—(See the case of Sarah, the widow of William Dewees, act April 11, 1818, 1st session 15th Congress; indemnity for property destroyed by the British in the revolutionary war. Also, the case of Moses Hazen, act of June 23, 1805, 2d session 8th Congress. Sarah Shillett's case, destruction of house while in public use, act March 3, 1825, 2d session 18th Congress. Nicholas Sewall's case, act June 30, 1834, 1st session 23d Congress. John Scriviner's case, act August 27, 1842, 2d session 27th Congress.)

CALVIN K. AVERILL,
Attorney for Claimants.

IN THE COURT OF CLAIMS.

JOSHUA MANDEVILLE and others vs. THE UNITED STATES. } No. 510.

Solicitor's Brief.

The petitioners allege that John Mandeville was, on the 4th day of October, 1777, the owner of a large frame dwelling house, used as an inn, together with a barn, carriage house, and sheds, at Peekskill, in the State of New York; that the said property was taken possession of by the agents of the United States, under the orders and directions of Generals Putman, Dougal, Huntington, &c., officers under their command, or some one of them, who occupied and used said dwelling-house as headquarters, and the other buildings for the reception of their baggage, ammunition, and provisions, and held courts-martial there; that while so occupied, the British forces ascended the Hudson river and landed at Peekskill, drove out the Americans and burned the buildings aforesaid, to the value of $3,500; and that said amount ought to be paid to them as the legal representatives of said John Mandeville.

The United States object to the payment of this claim upon several grounds:

1st. If there ever was any foundation for it, the witnesses who testify do not appear to be living or dead; and there is no proof to show that the United States had notice of the taking of said testimony.

2d. This claim is said to have arisen as early as the 4th day of October, 1777; and there is nothing to show that any application was ever made for its payment until the year 1838, although it appears from the papers in the case that the original owner of it (John Mandeville) did not die until the 17th of April, 1827, a period of about fifty years, and then the first we hear of it is in the year 1838, (eleven years after,) when the widow of the deceased applied to Congress. We think that this long delay is evidence to show the demand never had any real foundation; and if it had, then said delay leads strongly to the inference of its settlement by the government. At a very early period after the revolution, it seemed to be the policy of the government to ascertain and adjust the whole of its liabilities; and hence various resolutions and acts of Congress were passed for that purpose. The resolution of the 2d of November, 1785, provides that all persons having claims for services performed in the military department be directed to exhibit the same for liquidation to the commissioners of army accounts, on or before the 1st day of August ensuing the date thereof, and that all claims under the description above mentioned, which may be exhibited after that period, shall forever thereafter be precluded from adjustment or allowance and that the commissioners of army accounts give public notice of this resolution in all the States for six months.—(See 4th vol. of Journals of Congress, p. 603.) This resolution has reference only to a particular class of claims; but it evinces that policy of Congress, which was enlarged by subsequent legisla-

tion, and which legislation was doubtless intended to quiet and put to rest every description of demand or claim, whilst the evidence in relation thereto was fresh, against the government.

The resolution of the 23d of July, 1787, provides that all persons having unliquidated claims against the United States, pertaining to the late commissary's, quartermaster's, hospital, clothier's, or marine departments, shall exhibit particular abstracts of such claims to the proper commissioners appointed to settle the accounts of those departments, within eight months from the date hereof; and all persons having *other unliquidated* claims against the United States shall exhibit a particular abstract thereof to the Comptroller of the Treasury of the United States within one year from the date hereof; and all accounts not exhibited as aforesaid shall be precluded from settlement or allowance.—(Same book, p. 763.) This resolution, after applying the limitation to a certain description of demands not presented within eight months, by a general clause declares that *all unliquidated claims shall be barred after one year.*

By the act of Congress passed March the 27th, 1792, it is provided, that the operation of the resolutions of the late Congress of the United States, passed on the 2d of November, 1785, and the 23d day of July, 1787, so far as they have barred, or may be construed to bar, the claims of any officer, soldier, artificer, sailor, or marine, of the late army or navy of the United States, for personal services rendered to the United States in the military or naval departments shall, from and after the passing of this act, be suspended for and during the term of two years; and that every such officer, soldier, artificer, sailor, and marine, having claims for services rendered to the United States in the military or naval departments, who shall exhibit the same for liquidation at the treasury of the United States, at any time during the said term of two years, shall be entitled to an adjustment and allowance thereof, on the same principles as if the same had been exhibited within the term prescribed by the aforesaid resolutions of Congress: Provided, that nothing herein shall be construed to extend to claims for rations or subsistence money.—(See 1 vol. S. L., page 245.) This act was intended to afford relief only in the cases particularly specified; and that there might be no misapprehension, the claims for rations and subsistence money are expressly excepted from its operation. Thus showing that, whilst Congress was disposed to afford relief in particular cases, it did not intend to disturb the general operation of the limitation imposed by the resolution of 1787. By the act of February 12th, 1792, (1 vol. S. L., p. 301,) it is provided that all claims upon the United States for services or supplies, or for *other cause, matter, or thing*, furnished or *done* previous to the 4th day of March, 1789, whether founded upon certificates or other written documents from public officers, or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the first day of May, 1794, shall, forever after, be barred and precluded from settlement or allowance: Provided, that nothing herein contained shall be construed to affect loan office certificates of final settlements, indents of interest, balances entered in the books of the Register of the Treasury, certificates issued by the F

Treasury, commonly called registered certificates, loans of money obtained in foreign countries, or certificates issued pursuant to the act entitled an act making provision for the debt of the United States; and provided further, that nothing herein contained shall be construed to prohibit the proper officers of the treasury from demanding an account or accounts to be rendered for any moneys heretofore advanced and not accounted for, or from admitting, under the usual forms and restrictions, credits for expenditures equal to the sums which have been so advanced. This act is as comprehensive as language can make it, and creates a bar to every description of claim or demand against the United States, except such as are specially exempted from its operation. It is a re-affirmation of the resolution of 1787, and as there has been no legislation to change the law, as it stood under those acts, we think the petitioners' claim is barred by limitation. For further information upon the subject of limitations, see the acts of Congress collected in a book entitled Revolutionary Claims, at pages 60–'1–'2–'3–'4–'5 and 166.

DAN. RATCLIFFE,
Ass't Solicitor of the C. Claims.

KING, ADM'R OF THE ESTATE OF JOHN MANDEVILLE,

vs.

THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The facts, according to the petition, are as follows:

The intestate was, in October, 1777, the owner of a dwelling house and certain out houses, situate at Peekskill, in the State of New York. These buildings were, at the time aforesaid, taken possession of by the agents of the United States, under the orders of Generals Putnam, McDougal, Huntington, &c., who occupied and used the dwelling house as headquarters, and held courts-martial there, and used the out houses for the reception of their baggage, ammunition, and provisions. Whilst said buildings were so occupied, the British forces ascended the Hudson river, landed at Peekskill, drove out the Americans, and burned said buildings, which buildings were worth 3,500 dollars. There is among the papers a petition formerly presented to Congress, which states the grievance with more particularity. That petition says that General Putnam, of the American army, with his soldiers, took possession of the buildings and occupied them for the purposes of the army; that one room of the house was used as an office for the paymaster, and another room for a court-martial to sit in; and that sentinels were constantly stationed about said buildings, day and night, whilst they were occupied by the army.

There are three affidavits produced in support of the claim; one made by the widow of the intestate; one by John Cross; and the third by Henry Thomas. The widow's affidavit states that the intestate died in 1827. Whether the intestate ever demanded or received compensation for the injury complained of is not shown by the evidence.

This is a claim for unliquidated damages for an injury said to have been sustained by the intestate during the revolutionary war. The first demand for the claim, of which we are informed, was made by the widow, by a petition to Congress, in 1837, which was about sixty years after the cause of complaint is alleged to have occurred.

The claim is barred by the following statute of limitations, passed on the 23d of July, 1787:

"*Resolved,* That all persons having unliquidated claims against the United States, pertaining to the late commissary's, quartermaster's, hospital, clothier's, or marine department, shall exhibit particular abstracts of such claims to the proper commissioner appointed to settle the accounts of those departments, within eight months from the date hereof; and all persons having other unliquidated claims against the United States shall exhibit a particular abstract thereof to the Comptroller of the Treasury of the United States within one year from the date hereof; and all accounts not exhibited as aforesaid shall be precluded from settlement or allowance."—(4 Journ. of old Cong., 762–'3.)

In 1792 the operation of a part of the above act was suspended for two years, but even that temporary suspension did not apply to a case like the one before us.—(1 Stat. at Large, 245.)

The claim being thus barred by an act of Congress, the claimant of course is not entitled to relief.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 55.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received,
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

STEPHEN C. HAYDEN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Opinion of the Court on the petition, refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims:

The petition of Stephen C. Hayden respectfully represents: That your petitioner was appointed, in accordance with law, an inspector of the customs at the port of Petaluma, in the district of Sonoma, State of California, by L. B. Mizner, collector of Benicia, on the 14th February, 1854; that, under the authority of this appointment, on the 15th February, 1854, he commenced the discharge of his duties as inspector at the port aforesaid, and performed them diligently and faithfully until the 1st day of July, 1854, when, having applied to the collector for his salary due him for services as inspector for a period of four months, at the rate of $6 per day, he was informed by the collector that the Secretary of the Treasury declined to approve

his appointment; whereupon your petitioner made out his account against the government for his services as inspector from the 15th February to 1st July, 1854, inclusive, (142 days,) at $6 per day, amounting to $852, and demanded payment of L. B. Mizner, collector, when he refused to pay it. He subsequently, through his attorney, presented the same for payment to the Secretary of the Treasury, who refused to pay, for reasons contained in his letter of July 3, 1855, addressed to John S. Edwards, which will accompany this petition.

Your petitioner having performed the duties of inspector of the customs at Petaluma, California, during the time as stated above, under an appointment from the collector for that district, claims that the amount as stated above is justly due him, and prays the honorable Court of Claims to report a bill to Congress for his relief.

Your petitioner further states that he is the sole owner of the above claim.

STEPHEN C. HAYDEN.

COUNTY OF WASHINGTON, }
District of Columbia. }

Personally appeared before me, a justice of the peace in and for the county and district aforesaid, John S. Edwards, who made oath that the foregoing petition contains a true statement of facts, according to the best of his knowledge and belief.

Sworn before me this ninth day of August, 1855.

JNO. D. BARCLAY,
Justice of the Peace.

LAWRENCE & EDWARDS,
Attorneys.

IN THE COURT OF CLAIMS.

STEPHEN C. HAYDEN *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states the following case:

He was appointed an inspector of the customs at the port of Petaluma, in the district of Sonoma, State of California, by L. B. Mizner, collector of Benicia, on the 14th day of February, A. D. 1854. Under that appointment he diligently and faithfully performed the duties of inspector at that port from the 15th day of February until the 1st day of July, A. D. 1854. He was then informed by the collector that the Secretary of the Treasury had declined to approve of his appointment.

He claims compensation for his services at the rate of $6 per day, for 142 days, amounting to $852, which both the collector and the Secretary of the Treasury have refused to pay.

At the present stage of this case, the allegations of the petition are

taken to be true, and the question is, whether an order shall be mad directing testimony to be taken.

A collector has authority, with the approbation of the principal officer of the Treasury Department, to employ inspectors at the several ports within his district.—(1 Stat. at Large, p. 642, chap. 22, § 21.) His whole power over this subject is derived from the statute, and it is measured by the very terms in which it is conferred. He can, therefore, with the approbation of the principal officer of the Treasury Department, appoint an inspector, but not otherwise. In this case such approbation was not only not given, but actually withheld. The Secretary of the Treasury declined to approve of the appointment. The action of the collector was a mere nullity.

We are of the opinion that no order to take testimony shall be made in this case.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 56.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

FREDERICK GRIFFING *vs.* THE UNITED STATES.

1. The petition of the claimant and amended petition.
2. Documents exhibited as evidence by the claimant and transmitted to the House of Representatives.
3. Claimant's briefs.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed [L. S.] the seal of said Court, at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of Frederick Griffing, of Brooklyn, in the county of Kings, and State of New York, respectfully represents:

That on the 19th of September, A. D. 1846, your petitioner stated, by letter to the Secretary of the Navy, that "having been for some time in treaty with the owners for the purchase of the property lying

between the naval hospital and the navy yard, in the city of Brooklyn, with a view of selling it to the government; and not wishing to incur so heavy a responsibility without having some guarantee that they would take it at a given sum," he desired the views of the Secretary on the subject. That after some further negotiations with the Secretary of the Navy, your petitioner again wrote him, under date of November 16, 1847, that he had entered into written contracts for the purchase of said lands, and was then prepared to make a sale of the same to the government, although, as he therein stated, he had not yet received of the owners their deeds of the land. That on the 11th of December, 1847, the said Secretary addressed to your petitioner the following letter:

"NAVY DEPARTMENT,
"*Washington, December* 11, 1847.

"SIR: Referring to your letter of the 16th November last, and to the plan which accompanied it, and by the recommendation of the chief of the Bureau of Yards and Docks, I am willing to recommend to Congress an appropriation of two hundred and eighty-five thousand dollars for the purchase of the land described in that letter and plan, situated in Brooklyn, New York, bounded north by the Wallabout channel, south by Flushing avenue, east by the grounds of the United State naval hospital, and west by the grounds of the United States navy yard; understanding that for this sum you will make a perfect title, satisfactory to the United States district attorney, New York, to the whole of the premises thus described, including the rights of the riparian owners to the flats in the bay; and that no right is to be reserved to you, except that of taking off the buildings which are now on the property and constructing a sewer under ground through the western lot of said land, from Flushing avenue to the channel. Upon these terms, if you assent to them, I will complete the purchase as soon as the necessary appropriation shall be made by Congress; and that no time may be lost in bringing the subject to the attention of the proper committees, I will thank you to inform me, without delay, whether you will accede to this proposal. Should you do so, and Congress should neglect or fail to make the appropriation for the purpose at its present session, it is not expected that you will be further bound by your agreement.

"Very respectfully yours,

"J. Y. MASON.

"FREDERICK GRIFFING, Esq., *Washington.*"

That on receipt of the letter above set forth, your petitioner forthwith, at the Navy Department, accepted, in writing, the proposition contained in said letter, and so bound himself to convey said land to the government at the price stipulated therein. That Congress did make the appropriation asked for by the Secretary for the purchase of said land, by act of August 3, 1848, as follows: "For the purchase, by the Secretary of the Navy, of the land above and under water, bounded by Flushing avenue, in the city of Brooklyn, in the State of New York, the United States navy yard, hospital grounds, and

the Wallabout bay to the channel, two hundred and eighty-five thousand dollars: *Provided,* That no part of said sum of money shall be applied to the payment of the purchase money until a good and perfect title is secured to the United States for the said land and its appurtenances; that said appropriation was reported by the Naval Committee of the House of Representatives, as an amendment to the naval appropriation bill, said committee having advised the purchase of said property; that your petitioner, relying on said contract with the government, closed his negotiations with the owners of said land, and received deeds of all the numerous titles, and was ready to convey to the government "a perfect title, satisfactory to the United States district attorney," as the title stood at the execution of said contract, in December, 1847.

That after said contract was executed as aforesaid, an assessment was made by the city of Brooklyn upon said land, for building a street, to the amount of twenty-eight thousand two hundred dollars; that this assessment was not in contemplation at the time of said contract, was not known to the Naval Committee when they reported said amendment, but said appropriation was made to consummate the contract of December 11, 1847, and was not intended to, and does not, contain any new condition; that said assessment was wholly for the benefit of the purchaser; that the Secretary of the Navy, on the 9th day of August, 1848, six days after the passage of said act, wrote to the United States district attorney of New York, as follows: "I request that you will have the goodness to see to the execution, delivery, and record, of a deed for the property by the said Griffing, with general warranty, subject only to the reservations agreed to in my letter of December 11, 1847. Acting on the advice of the Attorney General, in whose opinion I concur, you will perceive that I have regarded the execution and delivery of such a deed as securing to the United States a perfect title to the premises. The conveyance will entitle the government, even if the vendee shall fail to do so, to satisfy and discharge the debts secured by mortgage on the property, and the retention of a sum of the purchase-money greater in amount than the incumbrances, will protect the government and secure the completion of the title, if the vendor shall not himself pay them," and communicated said instructions to your petitioner.

That, believing said assessments to be illegal, and having purchased said land solely for the use of the government, and personally bound himself for the payment therefor, and being held to convey the same to the government, provided said appropriation should be made, your petitioner had made no arrangement for the disposal of said land, or to meet his contracts of payment therefor to the owners; and so was compelled to, and did, convey said land to the government without full payment, and received only two hundred and fifty-five thousand dollars; the Navy Department retaining thirty thousand dollars, wherewith to pay said assessment; your petitioner then, and always, protesting that he was, on every principle of law and equity, entitled to receive the full consideration of said purchase, upon conveyance to the government of a perfect title, as of the date of said contract with said department; and that assessments, subsequently made on said

land for its improvement, were not incumbrances which he was bound to remove; that in his contracts for said land, he paid interest to the owners from the date of his contracts, bearing date in December, 1847, and in justice should receive the same.

That desiring to test the legality of said assessment, and to avoid any further controversy about the sum thus returned by the Navy Department, your petitioner arranged with said department to delay payment of said assessments until the validity thereof might be tested, and gave to the United States a bond, which was accepted by said department, in the penal sum of five thousand dollars, dated the 12th day of March, 1849, the condition of which bond will explain said arrangement with said department, and is as follows, to wit:

"Now, therefore, the condition of this obligation is such, that if the above bounden Frederick Griffing, shall well and truly save, keep, and bear harmless, and indemnify the United States of and from all harm, trouble, damage, costs, and charges that shall or may at any time arise, come, or happen to the said United States, or to the said premises or real estate, or to which the said United States, or the said premises or real estate may be subjected, for by reason of or on account of the postponement and delay of the payment of the said assessments, or any or either of them, until the legality and validity of the same shall be judicially determined as aforesaid, or until the amount of the said assessments justly due and payable shall have been ascertained by amicable adjustment as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue; *Provided, nevertheless,* That nothing in the foregoing obligation contained shall be taken or construed to waive, impede, obstruct, or in any way affect, any claim, demand, or equitable right which he, the said Frederick Griffing, has, or which he or his heirs, executors, or administrators hereafter may have, to claim and demand as against the said United States, that the said assessments, when their legality and validity shall have been judicially determined, or when the amount of said assessments justly due and payable shall have been ascertained by amicable adjustment as aforesaid, should be assumed and paid and discharged by the said United States."

That some correspondence with said Navy Department has been had by this petitioner, but he is not aware of any action of that or any other department, except as above set forth, upon said claim; that he is informed that the correspondence and other papers relative to this matter have been accidentally destroyed by fire at the Navy Department.

That this petitioner, at the first session of the thirty-third Congress, filed his petition setting forth this claim, which having been referred to the Committee on the Judiciary in the House of Repersentatives, the chairman thereof, at the second session of said Congress on the 26th day of January, 1855, made a report, numbered 32, favorable to this petitioner, with a bill for his relief, numbered 682, which said bill was finally passed by the said House of Representatives, as follows:

"That the Secretary of the Navy cause to be paid, out of any money in the treasury, to Frederick Griffing, the amount withheld from him

of the purchase-money for the property at Brooklyn, sold by him to the United States in pursuance of the act of third August, eighteen hundred and forty-eight, entitled 'An act making appropriations for the naval service for the year ending the thirtieth June, one thousand eight hundred and forty-nine.' "

That the said bill was, at the last named session, in the Senate, referred to the Committee on the Judiciary, which reported adversely to the same, and that no action was had upon said report.

That no other action than as above set forth has ever been had on this claim in Congress.

That he is informed that no further appropriation having been made for said purchase, it is not in the power of said department to pay said balances: wherefore he prays that such relief may be granted him as may seem just and proper; and, as in duty bound, will ever pray.

I am the sole owner of this claim.

FREDERICK GRIFFING.

I, Frederick Griffing, of Brooklyn, in the county of Kings, and State of New York, depose and say that the facts, as stated in the foregoing printed petition by me subscribed, are, to the best of my knowledge and belief, true.

FREDERICK GRIFFING.

CITY OF BROOKLYN, STATE OF NEW YORK, } ss.
King's county, July 6, 1855, }

Personally appearing said Frederick Griffing, made solemn oath to the truth of the foregoing affidavit, (the words I am the sole owner of this claim having been placed there before signing.)

Before me.

CHARLES H. THOMSON,
Commissioner of Deeds.

COURT OF CLAIMS.

FREDERICK GRIFFFING }
vs. } Amended Petition.
THE UNITED STATES. }

By leave of Court first had and obtained, the claimant amends his original petition in the following particulars, to wit: He states that the assessments laid by the city of Brooklyn on the property aforesaid, as shown in the original petition, were first laid and became a lien upon the property on the 15th May, 1848. But the street, for the making of which said assessments were laid, was not, in fact, opened and improved until the year 1849, when the contract of sale had been fully ratified by the act of Congress, and the said property virtually belonged to the government. The said street is on the boundary of the said property, separating it from that owned by private persons. The whole assessments for the said street were about sixty thousand dollars, one half of which was levied on the proprietors upon the opposite

side, and the whole was estimated upon the basis of increased value given to the property on both sides by the opening and improvement of the said street.

This petitioner alleges that the said improvement was wholly and entirely made after the passage of the law confirming the sale, agreed upon between the petitioner and the Secretary of the Navy; that the benefit of said improvement has enured to the United States, and no part of it, by any possibility, could or did enure to this petitioner. He also further states, that it is a benefit and advantage to the government to have this property separated, by a commodious street, from that of private individuals, and this advantage has been obtained at the expense of the petitioner; for the government has withheld thirty thousand dollars of the purchase money agreed to be paid to the petitioner, and has applied the same, as he is informed, to the payment of the said assessments. All of which, he insists, is unjust and oppressive, and entitles him to relief in this honorable Court, as prayed in his original petition.

FREDERICK GRIFFING.

Subscribed and sworn to this 4th day of April, 1856, before me.

GEORGE W. MORTON,
United States Commissioner.

CLAIM OF FREDERICK GRIFFING.

BRIEF.

To the honorable Court of Claims:

The facts alleged in the petition are briefly these:

The United States desired to purchase certain land in Brooklyn, owned in part by the claimant, but mostly by some thirty other several owners, and negotiated with Griffing, in 1846, to procure it. Griffing wrote to the Secretary of the Navy in September, 1846, desiring his views, and saying that he did not wish "to incur so heavy a responsibility without having some guarantee that they would take it at a given sum."

On the 16th November, 1847, Griffing again wrote the Secretary that he had entered into written contract for the purchase of said land, and was prepared to sell it to the government, though he said he had not yet taken deeds. To this the Secretary, on the 11th of December, 1847, replied, that he would recommend to Congress to make an appropriation of $285,000 for the purchase of the land, Griffing to make a "perfect title" of said land, and "complete the purchase as soon as the necessary appropriation shall be made." He requested Griffing to inform him without delay whether he "will accede to this proposal." He adds: "Should you do so, and Congress should neglect or fail to make the appropriation for the payment at its present session, it is not expected that you will be *further bound by your agreement.*"

Griffing, at the Navy Department, accepted in writing this proposition, and so bound himself to convey the land to the government at the price stipulated.

The naval committee was consulted, and advised the purchase, and reported the amount required as an amendment to the naval appropriation bill, with a proviso "that no part of said sum of money shall be applied to the payment of the purchase money until a good and perfect title is secured to the United States for the said land and its appurtenances."

The language of the proviso, as to "a good and perfect title," was suggested by the language of similar import in the letter of Secretary Mason, which formed the basis of the contract. This appropriation bill passed August 3, 1848.

Several months after the signing of the contract, and before the appropriation bill passed, an assessment of $28,200, not before contemplated by any party, was laid by the city of Brooklyn for opening and improving certain streets on said lands; but this assessment was not known to the naval committee, nor to any of the parties, when the bill passed, and of course the proviso was not designed specially to meet it.

After the appropriation the Navy Department declined to pay the full price of the land, but retained $30,000 to pay said assessment; and Mr. Griffing having bound himself to pay for said land to the original owners, and not having ability to meet his liabilities otherwise, was compelled to convey it without full payment.

The claimant contends—

1. That the Secretary's letter, and his written acceptance of the proposal in it, constituted a binding agreement of sale on both parties, contingent only on the appropriation, by which Congrers sanctioned it, and could refer only to the existing incumbrances.

The right of the city of Brooklyn to assess was no incumbrance. The exercise of that right, like the fluctuations of the water, or of the market value of the land, were appurtenant to the land, incident to it, and made a part of it.

"It is one of Pothier's rules of interpretation, which has been deemed consonant to the rules of common law, that 'however general the terms may be in which an agreement is conceived, it only comprehends those things in respect to which it appears that the contracting parties proposed to contract, and not to those they never thought of.' "—(*Case* vs. *Cushman, Watts & Searg.*, 546.)

This was a contract for the sale of the property as it then was. The parties could contemplate nothing else, except that it would be subject to the operations of natural causes, the sea, &c., and the legal action of the civil authorities.

Our allegations that this assessment was not in contemplation at the time of said contract, was not known to the naval committee when they reported the amendment making the appropriation, that said appropriation was made to consummate the contract of December 11, 1847, and was not intended to, and does not, contain any new condition, are at present to be taken as true, and can be readily proved at the proper time.

The Secretary of the Navy, after the passage of the act making the appropriation for the purchase, in his instructions, set forth in the petition, expressly refers to his letter of December 11, 1847, as the

basis of the contract to be executed, and says the conveyance is to be taken "subject only to the reservations *agreed to* in my letter of December 11, 1847."

The claim rests, then, upon the construction of this agreement entered into between Griffing and the Secretary of the Navy.

No question should be entertained as to the power of the Secretary of the Navy thus to contract; for whether, in strictness, he had such power or not, the naval committee, and Congress itself, have sanctioned the contract, and this claimant has conveyed his land to the government. Holding the property by virtue of the contract, upon no principle of law or equity can the government refuse to make payment, according to the true construction of that contract.

2. We contend that the United States is to be regarded, in equity, as owner of the estate from the date of the contract, and so is liable to pay the assessment.

Why should the seller take the risk of paying an assessment of this kind, which increased the value of the land, when the improvement was solely for the benefit of the purchaser? Had the assessment been for an aqueduct or for gas pipes, the principle would be the same. Is it possible, as matter of common sense, that the legal construction of such a contract can lead to results so manifestly unjust, as that this claimant shall be held bound to convey his land at a fixed price, and afterwards pay, for increasing its value, some thirty thousand dollars?

We only ask the application to this case of the established principles of law and equity.

"Equity looks upon that as done which is agreed to be done." This familiar principle is well illustrated in Craig *vs.* Leslie, 3 Wheaton's Rep., 577–8; 1 Story, Eq. Sect., 649.

"A purchaser, before conveyance, is, in equity, owner of the estate, almost to every purpose.

"If, before conveyance, a house should be burnt down, the loss would be his. If any acquisitions, as by lives dropping, should accrue, the profit would be his."—Rawlings *vs.* Burgis, 2 Vesey & Beames' Rep., 386.

"A vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance, and, on the other hand, he will be entitled to any benefit that may accrue to the estate in the interim. If, after the contract, and before the conveyance, the house were burnt down, the loss will fall upon the purchaser."—(Sugden on Vendors, p. 205–6; Paine *vs.* Meller, 6 Vesey's Rep., 349, and notes.)

"The consequence of the rule is, that if, after the contract, the estate be improved, in the interval between the contract and conveyance, or if the value be lessened, by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss."—(Sugden on Vendors, 206.)

Story says: "Courts of equity regard contracts for the sale of land, for most purposes, precisely as if they had been specifically executed."

"Thus, if a man has entered into a valid contract for the purchase of land, he is treated, in equity, as the equitable owner of the land,

and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes, by descent, to his heir as land."—(2 Story, Eq. Sect., 790; Doughty *vs.* Bull, 2 P. Wms., 320.)

Griffing could have been held, by a court of equity, to a *specific performance* of this contract to convey, and, if so, to convey merely the title, free from encumbrances, existing at the time of making his contract.—(2Story, Eq. Sect., 740; Cannel *vs.* Bucklee, 2 P. Wms., 243.)

In the case of leases, these principles have always been applied:

"Though the land be surrounded or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent."—(Dyer, 56, 6, cited in Paradise *vs.* Jane, Alleyn's Rep., 27.)

"It is well settled that, upon an express agreement to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from his obligation to pay the rent."—(3 Kent's Com., 466.)

Where part of a lot was taken for a street, it was held that the tenant was not discharged from his contract to pay rent and taxes.—(Patterson *vs.* Boston, 20 Pick. Rep., 159.)

3. This claimant has never waived his right, nor assented to a construction of it different from what he now insists upon, nor did the Secretary of the Navy ever understand that any other than the original contract was in force.

This is manifest from the condition of the bond recited in the petition, in which any such implied waiver is carefully negatived. This bond bears date of March 12, 1849, more than seven months after the passage of the act making the appropriation.

4. If this was not a binding *contract of sale*, it was, at least, an authority to Griffing by the officers of the government to purchase the land as their *agent*, having for his compensation the difference between $285,000 and the price he paid for the land, free from then existing encumbrances.

In this view he could not be held to warrant against encumbrances, arising without his default, and *through delay of Congress* to provide payment attaching to the land, before conveyance to the government, and after his contracts to purchase of the original owners for the use of the United States.

Whatever may be considered the undertaking of this claimant, it is clear that he acted on the faith of the proposition of the Secretary of the Navy, whose acts were sanctioned by Congress; that he purchased these lands upon the Secretary's proposition to pay him for them $285,000; that, without any neglect or default of his, having bound himself to pay for them upon the promise that he should receive that sum, he has not yet received thirty thousand dollars, part of the price stipulated, nor any pretence of any equivalent therefor, while it is fair to presume that the value of the lands has been enhanced by the improvement to that full amount. It would seem that a stronger claim can hardly be imagined than this presents to the consideration of this honorable Court.

B. B. FRENCH,
Attorney for Griffing.

COURT OF CLAIMS OF THE UNITED STATES.

FREDERICK GRIFFING *vs.* THE UNITED STATES.

Claimant's brief.

The contract upon which this claim arises is contained in the letter of the Secretary of the Navy to the claimant, dated 11th September, 1847. This proposition, which was the result of a correpondence, commenced in September, 1846, was immediately accepted by the claimant, as stated by tne chief of the Bureau of Yards and Docks, in his letter to the Judiciary Committee of the House, 25th January, 1854.—(*Ho. Rep. No.* 32, 2*d Sess.* 33*d Cong.*)

On the 5th of February, 1848, the Secretary of the Navy submitted all the correspondence to Congress, and asked an appropriation to "consummate the purchase on the terms arranged between the chief of the bureau and the proprietor."—(*Miscellaneous Ho. Doc. No.* 71, 1*st Sess.* 30*th Cong.*)

On the 3d August, 1848, Congress appropriated the precise sum necessary to consummate the Secretary's contract of 11th December previous.

Between the 11th December, 1847, and the 3d August, 1848, to wit: on the 15th May, 1848, the city of Brooklyn levied an assessment of $28,128 46 on the property in question for the improvement of Flushing avenue. The government insists that this assessment is an incumbrance which the claimant is bound to remove, and accordingly retains the sum of $30,000 out of the stipulated purchase money, and appropriates out of it $28,128 46 in discharge of the assessment, retaining the balance without any claim of right. The petitioner seeks to recover this sum of $30,000, as improperly held from him.

I. Although the Secretary of the Navy had no authority to purchase, and made the contract of 11th December, 1847, conditional upon the appropriation by Congress, yet, inasmuch as Congress, with a full knowledge of all the facts, *did* make the appropriation, the contract was thereby adopted and ratified from the beginning.

A contract by one, as agent of another, is valid, although the agent had no authority at the time, provided the principal afterwards ratifies the contract.—(*Sug. Ven.*, 134; *McLean vs. Dunn*, 4 *Bing.*, 722; *Gostel vs. Archer*, 2 *Adol. & Ell.*, 500; *Dunlap's Paley's Agency*, 171, *and note.*)

If the agency be adopted at all, it will be held to have been adopted throughout; for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder.—(*Culver vs Ashley*, 19 *Pick.*, 300; *Hovey vs. Blanchard*, 13 *New Hamp.*, 145; *New Eng. Mar. Ins. Co. vs. DeWolf*, 8 *Pick.*, 56; *Carnes vs. Bleecker*, 12 *John.*, 300; *Rich. Man. Co. vs. Stark*, 4 *Mason*, 296; *Parsons on Cont.*, 1*st vol.*, 46; *Dunlap's Paley's Agency*, 172.)

In the case of Delafield *vs.* The State of Illinois, 26*th Wend.*, 227, the circumstances under which a "sovereign" legislature may be presumed to sanction the unauthorized acts of its agent are discussed as

follows: "The legislature, in its sovereign capacity, acted as soon as it met, and it was convened specially, before the usual time, for this purpose. The expression of opinion, on the legality of the contract, by report or resolution, was not necessary to show non-acquiescence; and the refusal or neglect of the Senate to pass certain resolutions on the matter would by no means be conclusive of approbation standing alone. *Had the session passed off thus, without further action, acquiescence or approbation might perhaps be inferred.* But we find that on the 1st February, 1840, an act was found," &c.

This case is quoted merely to show that the same principles which apply to individuals in reference to the contracts of unauthorized agents, are likewise applicable to governments.

And surely, if under any circumstances, "*approbation might be inferred*" from the mere omission to repudiate the act, the positive action of Congress in the present case must remove all doubt. The Secretary's contract was, therefore, fully assumed and ratified *ab initio.*

II. The claimant insists that the contract of December, 1847, having been thus ratified from the beginning, the Brooklyn assessment is not an incumbrance upon the property within the meaning and legal effect of the usual convenant against incumbrances.

In the first place, the assessment was, in fact, an estimate of the increased value given to the property by the improvement of the street, of which improvement the whole benefit inured to the government, and no part to the claimant.

The act to incorporate the city of Brooklyn, passed April 8, 1834, section 40, gives to the common council "power to cause all streets, &c., to be graded, levelled, gravelled, paved, or macadamized," &c.; and further provides that "the expense of such measures shall be assessed by the assessors of said city, elected in and for the first seven wards thereof, *upon the owners and occupants of all the lands and premises benefitted thereby, in proportion to the amount of such benefit.*"

The act of 28th March, 1836, section 1, extends these provisions to the whole city.—(*See the Sessions Acts of New York.*)

It was under these acts that the assessment was made—the same being merely an estimate of the increased value given to the property by the improvement of the street. Upon no other principle could such a charge have been laid anywhere in the State.—(*See Constitution of New York, 7th section, 7th article.*)

To this effect are the cases in Comstock's and Barbour's Reports, in which the legality of the assessment was tried between the city of Brooklyn and the proprietor of the property.—(9 *Barbour's Report*, 536; — *Comstock's Reports.*)

The street did not run through the property, as incorrectly stated in the report of the house committee, but on one border of it, separating it from private property. The grading and paving of this street was an actual benefit to the United States. Although the assessment was made on the 15th May, 1848, the work of improvement was not done until the year 1849. No court of equity would compel a vendor, under a covenant against incumbrances, to pay for a benefit of this kind, falling upon the land after the contract was made, and without the fault or agency of the vendor.

In the second place, even if the assessment in question had been a mere tax or burden of any kind, instead of being an equivalent for an improvement made on the property, the loss would still fall upon the purchaser. This results from that well known equitable principle, that executory contracts for the sale of land are treated precisely as if they were executed.

The purchaser is treated in equity as the owner of the land, and the vendor as the owner of the money. Though the property may be destroyed by an earthquake, or houses burnt, or taxes imposed, after the contract of sale, and without the agency or fault of the vendor, the loss falls upon the purchaser.—(*Story's Equity, sec.* 790; *Sugd. Vend.*, 205–6; *Payne* vs. *Miller*, 6 *Vesey*, 249, *and notes; Rawlins* vs. *Burgiss*, 2 *Vesey & Beams; Cannel* vs. *Buchlee*, 2 *P. Wms.*, 243; 3 *Kent's Com.*, 466; *Patterson* vs. *Borton*, 20 *Pick.*, 159.)

Note also the following: *Dobbin* vs. *Brown*, 12 *Penn. or* 2 *Jones*, 75.

On the 2d December, 1829, Dobbins had *released* to the State all damages, and agreed that the Pennsylvania canal might pass through the lots. February 6, 1839, he conveyed with warranty. In 1840 the canal was made. The court held: "The releasor could not convey a right which was in the State from the beginning, and one that could be exercised without his consent, on the single condition of compensating the owner. The release forestalled the compensation, and it did no more. It was not a breach of a subsequent and prospective covenant, *not even against incumbrances;* and running, as it did, with the land, it could not, by any construction, be more than a clog on the enjoyment."

In the case of Frost *vs.* Earnest, 4 Whart., 86, an act of the legislature authorized the widening of the street, passed 25th March, 1831. Lease with covenant for quiet enjoyment, 3d January, 1833. Street widened and lessee ejected, 13th March, 1834. By the court: "But if the vendee lose the premises, not because of defect of title in the vendor, but on the very ground that the vendee has a good title from the vendor, which the State, by virtue of its sovereign power, authorizes to be taken from him, stipulating to pay him for it, on what principle can he have recourse to the vendor on such a covenant?"—(See also Spring *vs.* Tongue, 9 Mass.)

The adverse opinion of the Attorney General, 5th vol. Opinions, p. 15, omits wholly to notice the fact that Congress, with a full knowledge of all the circumstances, ratified the unathorized contract of the Secretary. That officer shows conclusively that the Secretary had no power to make the contract of the 11th December, 1847; but he does not attempt to show that the government has not assumed the act of the Secretary, with all its incidents and responsibilities. In the conclusion of his opinion, the law officer says: "There having been no communication made to Congress nor to the Secretary previous to the appropriation, that the further sum of $28,128 43 would be needed, beyond the sum appropriated, in order to acquire a perfect title; and Congress having proceeded upon the faith of the correspondence which was communicated to them, the Secretary would have no authority to pay or allow that further sum, or to permit it to remain upon the property, as due from the United States, but must

regard the whole sum appropriated as the full consideration for the entire unincumbered title."

The question in this court is somewhat different from that which was before the Attorney General. It is not whether the Secretary has authority to pay this demand, for we know he cannot pay without an appropriation; but it is, whether the government, by virtue of its purchase of this property, does not become liable even for *actual incumbrances* imposed upon the property, without fault or agency of the vendor, between the time of contracting and that of completing the purchase. It will not do to say there was no appropriation, and no authority to charge the government beyond the sum appropriated. If the government make purchases of property at all, it must take the incidents and responsibilities which law and equity impose upon all purchasers. The authorities say, that if between the date of the contract of purchase and that of the conveyance of a house the wall should fall and injure adjoining property, the damages will rest upon the vendee, and not upon the vendor. In such a case as this, the government could not set up the defence that no appropriation had been made, and therefore the contract of purchase could not create a liability beyond the stipulated and appropriated sum. Such a defence is equally absurd in the present case. But it becomes worse than absurd, upon consideration of the fact that the assessment was made for the increased value given to the property, by an improvement which was made after the act of Congress, and the whole benefit of which accrued to the government alone. It is most respectfully submitted that it would be a most iniquitous exaction to force the vendor to pay for benefits conferred upon the vendee after the contract of sale had been made.

It may be said the property of the government is not liable to taxation or assessment by the State authorities, and, therefore, although the government may have been the owner in the eye of equity, yet the payment cannot be claimed. This would be a hard rule, if it were sound in principle. But, in fact, equity looks upon the vendor, after a contract of sale, as a trustee for the vendee, the latter being regarded as the real owner for almost all purposes. If, therefore, the him, as its trustee, holding the legal title for its benefit, to such exactions as that in question, it would be bound by every principle of government choose to place itself in this relation to the citizen, exposing right to assume and discharge the obligation. The force of this position becomes doubly strong, when, as already repeatedly stated, the whole benefit of the assessment is enjoyed by the government, and not by its innocent trustee.

For the claimant,

B. B. FRENCH,
FRED. P. STANTON.

IN THE COURT OF CLAIMS.

FREDERICK GRIFFING *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

On the 19th day of September, A. D. 1846, the petitioner, in a letter from him to the Secretary of the Navy of that date, stated: "Having for some time been in treaty with the owners for the purchase of the property lying between the naval hospital and navy yard in the city of Brooklyn, with a view of selling it to the government, and not wishing to incur so heavy a responsibility without having some guaranty that they would take it at a given sum, the subject has been before the bureau twice, who are in favor of its purchase."

On the 16th day of November, A. D. 1847, the petitioner, in a letter from him to the Secretary of the Navy, said: "Referring to my former letter to you on the same subject, I have entered into written contracts for the purchase of all the ground between the navy yard and navy hospital, lying north of Flushing avenue, and the rights of the riparian owners to the ground covered by water (or mud flats) in said bay; and am now prepared to make a sale of the same to the government, should they desire to purchase. The deeds of conveyance have not been executed to me, but are to be made ready and delivered within ninety days from the 15th October past."

The Secretary of the Navy, in a letter from him to the petitioner, dated December 11, A. D. 1847, said: "Referring to your letter of the 16th November last, and to the plan which accompanied it, and by the recommendation of the chief of the Bureau of Yards and Docks, I am willing to recommend to Congress an appropriation of two hundred and eighty-five thousand dollars for the purchase of the land described in that letter and plan, situated in Brooklyn, New York, bounded north by the Wallabout channel, south by Flushing avenue, east by the grounds of the United States naval hospital, and west by the grounds of the United States navy yard; understanding that for this sum you will make a perfect title, satisfactory to the United States district attorney, New York, to the whole of the premises thus described, including the rights of the riparian owners to the flats in the bay, and that no right is to be reserved to you, except that of taking off the buildings which are now on the property, and constructing a sewer under ground through the western lot of said land from Flushing avenue to the channel. Upon these terms, if you assent to them, I will complete the purchase as soon as the necessary appropriation shall be made by Congress; and that no time may be lost in bringing the subject to the attention of the proper committees, I will thank you to inform me without delay whether you will accede to this proposal. Should you do so, and Congress should neglect or fail to make the appropriation for the purpose at its present session, it is not expected that you will be further bound by your agreement."

The petitioner alleges, "that on receipt of the letter above set forth, your petitioner forthwith, at the Navy Department, accepted,

in writing, the proposition contained in said letter, and so bound himself to convey said land to the government, at the price stipulated therein."

The chief of the Bureau of Yards and Docks, in a letter from him to the Secretary of the Navy, dated the 25th day of January, A. D. 1854, stated: "In reply, I have the honor to state succinctly, that, so far as is known to me, there was no other contract or bargain entered into or made between the Secretary of the Navy and Mr. Griffing than is contained in the said letter from the Secretary of the Navy to him, dated December 11, 1847, which is correctly recited in said memorial, and his acceptance of the terms therein proposed."

The Secretary of the Navy, in a letter from him to the chairman of the committee on naval affairs, dated February 5, A. D. 1848, said: "I have the honor to transmit a copy of a communication from the chief of the Bureau of Yards and Docks, with accompanying trace maps, showing the plan of the navy yard and hospital grounds at Brooklyn, New York, and the grounds lying between these two places.

"The public interest, in my opinion, will be greatly promoted by the purchase of the intervening ground, so as to connect the two establishments belonging to the government, for naval purposes. The claims of riparian proprietors will, unless the purchase be now made, lead to expensive and tedious litigation, and if maintained, seriously affect the value of the public property and its utility for the purposes for which it has been purchased and improved.

"Entertaining this opinion, I have addressed to Mr. Frederick Griffing a letter, of which I also enclose a copy; and I recommend, if it meet the approbation of the honorable Committee on Naval Affairs, that authority be given to make the purchase, and the necessary appropriation made to consummate the purchase on the terms arranged between the chief of the bureau and the proprietor, which appear to me reasonable."—(Doc. No. 71, (Mis.) 30th Cong., 1st sess., H. of R.)

By the act entitled "*An act making appropriations for the naval service for the year ending the thirtieth June, one thousand eight hundred and forty-nine,*" approved August 3, A. D. 1848, Congress made the following appropriation: "For the purchase by the Secretary of the Navy of the land above and under water, bounded by Flushing avenue, in the city of Brooklyn, in the State of New York, the United States navy yard, hospital grounds, and the Wallabout bay to the channel, two hundred and eighty-five thousand dollars: *Provided*, That no part of said sum of money shall be applied to the payment of the purchase money until a good and perfect title is secured to the United States for the said land and its appurtenances."—(9 Stat. at L., p. 268, ch. 121, § 1.)

The petitioner, in his original petition, alleges "that after said contract was executed as aforesaid, an assessment was made by the city of Brooklyn upon said land for building a street, to the amount of twenty-eight thousand two hundred dollars; that this assessment was not in contemplation at the time of said contract, was not known to the naval committee when they reported said amendment, but said appropriation was made to consummate the contract of December 11,

1847, and was not intended to, and does not, contain any new condition."

In his amended petition, the petitioner states "that the assessments laid by the city of Brooklyn on the property aforesaid, as shown in the original petition, were first laid and became a lien upon the property on the 15th May, 1848. But the street, for the making of which said assessments were laid, was not, in fact, opened and improved until the year 1849, when the contract of sale had been fully ratified by act of Congress, and the said property virtually belonged to the government."

The common council of Brooklyn adopted the following ordinance: "Be it ordained by the common council of the city of Brooklyn in common council convened, this 26th day of June, one thousand eight hundred and forty-eight, That the assessors apportion the expense for grading Flushing avenue from Hampden street to Clermont avenue, under such directions as shall be given by the street commissioner and one of the surveyors.

"And be it further ordained, That Jacob B. Boerum and James C. Rhodes be, and they are hereby, designated to make an apportionment of the expense of said improvement, and to make a just and equitable assessment thereof among the owners or occupants of all the lands and premises benefitted thereby in proportion to the amount of said benefit."

The assessment committee made the following report: "The assessment committee, to which was referred the within assessment roll for Flushing avenue grading from Hampden street to Clermont avenue, report: That they have examined the same, and believing all the proceedings to have been regular, respectfully recommend that the same be, and is hereby, confirmed.

"*Resolved*, That an abstract of the aforesaid assessment roll be furnished the comptroller, and that warrants be issued in payment of the various charges therein mentioned, when moneys shall have accrued in the treasury for that purpose."

This report was adopted by the common council on the 10th day of July, A. D. 1848, and approved by the mayor on the 12th day of July, A. D. 1848.

On the 27th day of June, A. D. 1848, the mayor and common council issued a commission to the assessors to execute the ordinance of the 26th day of June, A. D. 1848.

There is on file, also, the following certificate:

"Brooklyn, June 30, 1849. This is to certify, that William Beard, the contractor for grading Flushing avenue from Hampden street to Clermont avenue, has performed the said work in conformity to the grade line adopted by the common council.

"JOHN ROLFE."

There is no evidence before us in regard to the *time when* "the grade line" was adopted, or *when* the grading was done.

The common council of Brooklyn have power to cause all streets to be graded, and the expense is assessed by the assessors of the city,

"upon the owners and occupants of all the lands and premises benefitted thereby, in proportion to the amount of said benefit."

On the 9th day of August, A. D. 1848, the Secretary of the Navy, by a letter of that date, informed the petitioner that the appropriation already mentioned had been made. He also said: "Referring you to my letter of the 11th December last, and to your reply of that date, I inform you that I am now preparing to consummate the purchase of the real property mentioned on the part of the United States.

"I enclose copies of two letters written by me, one to the United States district attorney, and the other to the navy agent of New York. On your execution and delivery of such a deed for the premises, with general warranty, as will be approved by the district attorney, the navy agent will pay you one hundred and fifty thousand dollars, on account of the said purchase. On your exhibiting to the district attorney satisfactory evidence and assurance of the satisfaction of the several mortgages now binding on the premises, and his certifying the fact to the navy agent, he will pay to your order the amount of the debt secured by such satisfied encumbrance; and on the satisfaction of all the encumbrances, the balance of the purchase money will be paid to you with the reservation now mentioned. Since the passage and approval of the act of Congress, giving authority to purchase and making the appropriation for that object, I have received information that the city authorities of Brooklyn have made assessments on the premises by you about to be conveyed to the United States, amounting to $28,200, for purposes specified in such assessments, or the orders for the assessments. I have submitted to the Attorney General of the United States the question, whether, on the facts stated, the United States are bound to pay the assessments over and above the purchase money. I will enclose you a copy of his opinion, which you will perceive will devolve on you as vendor the burden of making said payments, unless you can successfully resist the payment. I propose, therefore, to retain of the purchase money a sum sufficient, say thirty thousand dollars, out of which on your account this department will cause the said assessments to be paid as they may fall due, unless you shall have previously procured, by judicial decision or otherwise, the annulment of the said assessments."

In the letter of the chief of the Bureau of Yards and Docks to the Secretary of the Navy, of January 25, A. D. 1854, it is stated: "These assessments by the city had been levied between the dates of Mr. Griffing's acceptance of the Secretary's proposition of December 11, 1847, and the passage of the above act."—(Report, No. 32, 33d Cong., 2d sess., H. of R.)

The Attorney General, in his letter to the Secretary of the Navy, of August 7, A. D. 1848, "states that the assessments amounted to the sum of $28,128 46, of which $17,026 71 was confirmed on the 15th of May, 1848, and the remainder, $11,101 75, on the 10th of July last, and the assessments became liens on the lands from the date of confirmation." He advised as follows: "There having been no communication made to Congress, nor to the Secretary, previous to the appropriation, that the further sum of $28,128 46 would be needed beyond the sum appropriated in order to acquire a perfect title, and

Congress having proceeded upon the faith of the correspondence which was communicated to them, the Secretary would have no authority to pay or allow that further sum, or to permit it to remain upon the property as due from the United States, but must regard the whole sum appropriated as the full consideration for the entire unencumbered title."

On the 14th day of August, A. D. 1848, the petitioner, together with his wife, by deed of that date, conveyed the premises above mentioned to the United States in fee simple, subject to certain reservations therein mentioned. The deed contains covenants, that the petitioner was seized in fee, that the grantors had the right to convey in manner and form as therein mentioned, that the premises then were "free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, *taxes*, *assessments*, and encumbrances, of what nature or kind soever," for further assurance, and general warranty.

On the 15th day of August, A. D. 1848, the petitioner received $150,000, and various payments thereafter, until on the 10th day of October, A. D. 1848, when he received $17,417 53, leaving of the purchase money the sum of $30,000, which was retained by the United States to meet the assessments made by the city of Brooklyn.

On the 12th day of March, A. D. 1849, the petitioner, together with Samuel Bouton, his surety, gave to the United States a bond, in the penalty of $5,000, conditioned as follows:

"Whereas the said Frederick Griffing and Catherine, his wife, heretofore, by deed bearing date the fourteenth day of August, in the year of our Lord one thousand eight hundred and forty-eight, and recorded in the office of the clerk of the county of Kings, in liber 183 of the conveyances, page 114, conveyed to the United States certain real estate, situate at Brooklyn, in the said county of Kings, as by reference to said deed will more fully appear: and whereas certain assessments had been imposed and laid by the corporation of the city of Brooklyn upon certain portions of the said real estate previous to the conveyance of the same to the said United States, which said assessments amounted in the whole to twenty-eight thousand one hundred and twenty-eight dollars and forty-six cents, and were claimed and alleged by the said corporation to be a valid lien and encumbrance upon the said portions of the said real estate to that amount.

"And whereas out of the purchase money agreed to be paid to the said Frederick Griffing by the said United States for the said real estate, the sum of thirty thousand dollars has been retained, and is now in the hands of the Secretary of the Navy of the said United States to pay and discharge the said assessments when they shall respectively become due and payable.

"And whereas certain of the said assessments are now due and payable to the said corporation; and whereas the said Frederick Griffing is desirous to contest the legality and validity of all the said assessments, by legal proceedings, or by amicable adjustment with the said corporation, to ascertain the amount of said assessments justly due and payable to the said corporation, and has requested that none of the said assessments should be paid or discharged by the said Secretary of

the Navy, until the legality and validity of the same shall be judicially determined, or until the amount of said assessments due and payable to the said corporation shall be ascertained by amicable adjustment.

"And whereas the said Secretary of the Navy is willing and has agreed not to pay the said assessments, nor any part of them, until a reasonable time, of which time the Secretary of the Navy for the time being shall be the sole and exclusive judge, has elapsed, to afford the said Frederick Griffing an opportunity to contest the legality and validity of said assessments, and to obtain a judicial determination as to their legality and validity, or by amicable adjustment, as aforesaid, to ascertain the amount of said adjustments justly due and payable, provided the said Frederick Griffing, with adequate security, shall engage to protect and indemnify the said United States from all costs, loss, or damage, which can or may ensue to the said United States, by reason of the postponement and delay of the payment of the said assessments, or either of them.

"Now, therefore, the condition of this obligation is such, that if the above bounden Frederick Griffing shall well and truly save, keep and bear harmless and indemnify the United States of and from all harm, trouble, damage, costs and charges, that shall or may at any time arise, come, or happen to the said United States, or to the said premises or real estate, or to which the said United States or the said premises or real estate may be subjected, for, by reason of, or on account of, the postponement and delay of the payment of the said assessments, or any or either of them, until the legality and validity of the same shall be judicially determined as aforesaid, or until the amount of the said assessments justly due and payable shall have been ascertained by amicable adjustment as aforesaid, then this obligation to be void; otherwise to remain in full force and virtue. Provided, nevertheless, that nothing in the foregoing obligation contained shall be taken or construed to waive, impede, obstruct, or in any way affect, any claim, demand, or equitable right, which he, the said Frederick Griffing, has, or which he, or his heirs, executors or administrators hereafter may have, to claim and demand, as against the said United States, that the said assessments, when their legality and validity shall have been judicially determined, or when the amount of said assessments justly due and payable shall have been ascertained by amicable adjustment, as aforesaid, should be assumed and paid and discharged by the said United States."

In a judicial proceeding between the petitioner and the city of Brookyln, it was determined that the petitioner was liable for the assessments.—(9 Barbour R., 536; 4 Comstock R., 419.) The Secretary of the Navy thereupon paid the $30,000 to the city authorities of Brooklyn. This sum was not sufficient to pay the debt and cost.

The evidence before us in regard to the assessments is not complete. When the first steps for the grading of Flushing avenue were taken, or what they were, does not appear. The attorney general, as we have seen, in his letter of the 7th day of August, A. D. 1848, states that the assessments amounted to the sum of $28,128 46, "of which $17,026 71 was confirmed on the 15th of May, 1848." What is meant by this, we have no means of ascertaining. It shows, however,

that proceedings in relation to the grading had been commenced before that time.

No information in respect to the grading, or the assessments, was given either to the Secretary of the Navy or to Congress till after the appropriation was made.

The petitioner claims that the United States were bound to pay the assessments, or to exonerate him from his liability therefor, and that they still owe him the $30,000.

It is not pretended that the Secretary of the Navy, before the 3d day of August, A. D. 1848, had the power to make the purchase in question, or any contract in relation to it. The sixth section of the act of May 1, A. D. 1820, expressly declares: "That no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment; and excepting, also, contracts for the subsistence and clothing of the army or navy, and contracts by the quartermaster's department, which may be made by the secretaries of those departments." And the seventh section, in terms equally explicit, declares: "That no land shall be purchased on account of the United States, except under a law authorizing such purchase."—(3 Stat. at L., p. 508.) It is, nevertheless, insisted that the Secretary's letter of the 11th of December, A. D. 1847, and the petitioner's reply thereto, constituted a contract for the purchase of the land by the United States, which, though unauthorized when it was made, was yet ratified and confirmed by the act of August 3, A. D. 1848.

The petitioner, in his letter of the 16th of November, A. D. 1847, informed the Secretary that he was then ready to sell the land, if the government desired to purchase it. The Secretary, in his answer thereto, of the 11th of December, A. D. 1847, stated that he was "willing to recommend to Congress the appropriation of two hundred and eighty-five thousand dollars for the purchase of the land," and desired, in order that no time might be lost in bringing the subject to the attention of the proper committees, that the petitioner would inform him, without delay, whether he would accede to this proposal. The petitioner forthwith acceded to it. But what was the proposal? Simply, that the Secretary would recommend to Congress the appropriation of $285,000 for the purchase, upon the terms mentioned in his letter. The Secretary's object plainly was to obtain the authority of the petitioner to say to Congress that the purchase could be made at the price specified, if they should desire it. Neither he nor the petitioner understood that he had the power to make a contract for the purchase. The petitioner, in his letter, had said: "If my proposition for a sale be entertained, the question of final purchase may be left open until the adjournment of Congress;" and the Secretary, in reply thereto, stated, that if the petitioner should accede to his proposal, "and Congress should neglect or fail to make the appropriation for the purpose at its present session, it is not expected that you will be further bound by your agreement." There is no room for doubt, therefore, that the whole matter was well understood on both sides. The Secretary proposed to recommend to Congress to

make an appropriation for the purchase of the land on certain specified terms, and the petitioner acceded to his proposal.

But this was not a contract for the purchase of the land. At most, it was an undertaking on the part of the Secretary that he would advise Congress to make the purchase on the terms which had been arranged between him and the petitioner. To ratify the acts of the Secretary in the premises, therefore, would amount merely to an approval of his advice. It would not be the adoption of his contract, for he made none. He only agreed that he would advise that a contract should be made. *Omnis ratihabitio retrotrahitur et mandato æquiparatur*—subsequent assent given to what has been already done, has a retrospective effect, and is equivalent to a previous command. But subsequent assent is only equivalent to a previous command, and if such previous command had been given in the present instance, the acts of the Secretary would have been no more than what they were without it. In fact, he had authority to do all that he undertook to do.

In his letter to the naval committee, the Secretary did not pretend that he had made a contract with the petitioner, either absolute or conditional. He merely recommended that *authority should be given to make the purchase*, and *the necessary appropriation made to consummate the purchase on the terms which had been arranged between the chief of the Bureau of Yards and Docks and the petitioner*.

With the correspondence between the petitioner and the Secretary, and the latter's recommendation before them, Congress passed the act of August 3, A. D. 1848. Notwithstanding proceedings in relation to the grading of Flushing avenue had been had before the common council of Brooklyn at least as early as the 15th of May, A. D. 1848, no information respecting it had been given either to the Secretary or to Congress. The Secretary recommended the purchase under the impression, that for the purchase money, suggested by him, a good and perfect title to the whole land was to be given to the United States; and Congress, acting upon this recommendation, and strictly conforming to it, made the appropriation upon the express condition that "a good and perfect title" should be secured to the United States. The Secretary asked for authority to make the purchase, and that authority was given by the act, and the very mode in which it was to be exercised was thereby expressly declared. It plainly contemplates a purchase *to be* made, not the ratification of one which had already been made.

When the appropriation was made, the petitioner had already become a debtor to the city of Brooklyn for the amount of the assessments, and the land in question was subject to a lien therefor. A good and perfect title, therefore, could not be given until this lien was removed. In requiring its removal, we think that the Secretary of the Navy but complied with the plain requirements of the act of Congress under which he acted.

We are of the opinion that the petitioner is not entitled to relief.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 57.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully present the following documents as the report in the case of

ANN W. BUTLER, ADM'X vs. THE UNITED STATES.

1. The petition of the claimant.
2. Documents filed with the petition as evidence, transmitted to the House of Representatives.
3. Documents received from the Treasury Department in answer to an order of the Court, and transmitted to the House of Representatives.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, }
Washington County. }

To the honorable the Judges of the Court of Claims:

The petition of Ann W. Butler, a resident citizen of Pennsylvania, and administratrix of General Richard Butler, deceased, respectfully showeth unto your honors: That the government of the United States

is justly indebted to her in the sum of $4,697 60, with interest on $4,256, from the 14th of January, 1784, till paid.

Petitioner would represent that, as early in the war of the revolution as July 20, 1776, Richard Butler was commissioned by Congress a major of the Pennsylvania continental line of the army; in 1777 was promoted to lieutenant colonel—afterwards to full colonel; and in that rank served to the end of the revolutionary war in 1783. On the 4th of March, 1784, Colonel Butler was elected by Congress one of the five commissioners to negotiate with the Indians; and at the commencement of the northwest Indian war he again entered the service of his country with the rank of general, and at the battle of the Miami Rapids, (Ohio,) in the year 1791, he received a mortal wound. These facts are matter of history.—(See Life of Joseph Brant, vol. 2, p. 308-9.)

Your petitioner would further represent that, on the 14th day of January, 1784, the said general, then Colonel Butler, loaned and advanced to the government of the United States, *in cash*, the sum of four thousand two hundred and fifty-six dollars; which said sum of money the government of the United States received and appropriated to its own use and benefit; and having so used and appropriated it the said government became liable to pay the same, with interest thereon, from the 14th January, 1784, but being so liable and having undertaken and promised to pay the same, the said government has refused, and still doth refuse, to pay the said sum with interest as aforesaid to the said General Butler in his lifetime or to any of his legal representatives since his death; to the great damage and injury of your petitioner thirty thousand dollars.

Your petitioner would further represent, that the said government of the United States was indebted to the said General Butler, (upon the rendition of his account current, to wit: On the 17th day of August, 1786, as one of the commissioners for holding Indian treaties,) in the further sum of four hundred and forty-one dollars and sixty cents; as is fully shown by the records on file in the office of the Register of the United States Treasury.—(1 vol. Wayne and Beom, U. S. Law.)

Your petitioner claims no interest as due on this item of $441 60, but prays that the principal be allowed her, in addition to the item of $4,256, for cash advanced, with interest on the same from the date of the advancement till payment.

Again, your petitioner would represent that, on the 20th day of January, 1846, the heirs of the said General Butler, memorialized the Congress of the United States for relief, praying an appropriation to be made to pay off and discharge the said debt and interest, which said memorial was referred to the Committee on Revolutionary Claims in the Senate, but no report thereon was ever made. Again, on the 29th day of December, 1854, your petitioner, who had in the meantime been appointed administratrix upon the estate of the said General Butler, as is shown by the official certificate of said appointment hereto annexed and prayed to be taken as a part of this petition, memorialized Congress, and her said memorial was also referred to the Committe on Revolutionary Claims in the Senate, but without any report being made thereon though petitioner is assured that the said committee had unanimously agreed to report a bill for her relief.

Petitioner would represent that the heirs-at-law of the said General Butler are the only persons interested in the said claim, and after due proceedings had in the premises, she prays your honorable Court to prepare and report to Congress a bill appropriating to her, as administratrix on the estate of the said General Butler, the said sum of $4,697 60, with interest on $4,256, at the rate of six per cent. per annum, from the 14th day of January, 1784, till paid; and, as in duty bound, your petitioner will ever pray, &c.

ALEXANDER H. EVANS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County. }

Personally appeared before the undersigned authority, a justice of the peace in and for the said district and county, Alexander Ray, who, after being duly sworn, declares that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

Subscribed and sworn to this ——— day of July, 1855.

ALEXANDER RAY.

IN THE COURT OF CLAIMS.

ANN W. BUTLER, ADMINISTRATRIX OF GENERAL RICHARD BUTLER, DECEASED, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The petition presents two claims:

The first is for the sum of $4,256, alleged to have been lent by the intestate to the United States on the 14th of January, 1784. Interest on that sum is also claimed.

There is no evidence whatever of this demand for money lent. But if there were evidence of the alleged loan, the claim would be barred by the statute of limitations of the 12th of February, 1793.—(1 Stat. at Large, 301.)

The other claim is for $411 60, being a balance in favor of the intestate on the books of the Register of the Treasury. The entries of the debits and credits in the account in which the balance appears were made in 1786.

The intestate was killed in battle in 1791. According to the petition, Congress was applied to in 1846 and 1854 for an allowance of said claims, but no action was taken on the application.

With regard to the claim of $411 60, the only evidence to suppot it is an account of General Butler in one of the books of account in the office of the Register of the Treasury. This account has, on the debit side, two items, which are added up, the amount being $5,597 79. On the credit side there are three items, which are also added up; the amount being $6,009 49. The above entries are in black ink. On the debit side of the account and below the other entries, there is

the following entry in red ink, viz: "288. Bal. $411 60." What the last named entry in red ink, with the figures 288, means, it is impossible to ascertain from inspection. A copy of the account, as it appears on the books of the Register of the Treasury, is among the papers in the case.

Considering the uncertainty of the account as stated above, and the fact that many of the account books of the treasury were, many years since, destroyed by fire, and considering also the great lapse of time—more than seventy years—since the said entries of debits and credits appear to have been made, we are of opinion that, without some explanatory evidence, the claimant is not entitled to recover.

Our opinion is, therefore, against both the claims.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 58.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

RALPH RICHARDSON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents received from the Treasury Department, in reply to the order of the Court, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The undersigned, your petitioner, Ralph Richardson, of Newark, in the State of New Jersey, executor of the last will and testament of Margaret B. Cameron, deceased, respectfully represents: That in the years 1775 and 1776, James Bell, of Chambly, in the province of Lower Canada, rendered services and furnished supplies to the continental army then in Canada, under the proclamation of General Washington, amounting at that time to at least $6,056 34, no part of which was paid during the lifetime of said Bell, although strenuous exertions were made by him to obtain the same.

That James Bell died in 1814, having previously made his will on

the 27th of April of that year, giving to his children six livres apiece, in addition to what he had previously given them, and to his wife, Margaret Bell, all his other property.

That on the 15th day of January, 1828, Margaret Bell, the widow and legatee of James Bell, gave and granted, by deed of assignment and transfer, to her daughter, Margaret B. Cameron, the wife of Daniel Cameron, as sole owner of the same, all her right and title to all accounts due to her husband, James Bell, deceased, from the United States.

That the said Margaret B. Cameron, on the 22d day of July, 1844, after the decease of her husband, Daniel Cameron, made her will, which was duly proved and allowed on the 11th of September, 1844; and in and by said will, after making provision for the payment of her debts, she gave all her estate, of whatsoever name or kind, to her daughter, Caroline M. Richardson, who is the wife of your petitioner, and appointed your petitioner her executor, and he has also been duly appointed by the court having jurisdiction of the matter.

As the proper and legal representative, therefore, of all who have rights to this claim, which originally belonged to James Bell, your petitioner prays that the same may be allowed to him as executor of the last will and testament of Margaret B. Cameron; the avails to be disposed of by him as the law shall direct.

Your petitioner further represents, that on the 30th of June, 1834, an act was passed by Congress for the relief of the heirs of James Bell, directing the accounting officers of the treasury to make up the accounts of James Bell, and pay the same, not exceeding the sum of $5,727 03; that in pursuance of this act the account was stated at the Treasury Department, and there was found due, for supplies furnished, &c., by said Bell, prior to June 15, 1776, the said sum of $6,056 34. This sum included no item for interest, but it appeared that the interest on the same, computed to that time, amounted to the sum of $21,091 20. The said sum of $5,727 03 was paid, in accordance with the act, to the said Margaret B. Cameron, your petitioner's testate, and Daniel Cameron, her husband; leaving at that time, as your petitioner claims, for the original debt and interest, the sum of $21,420 51, which then became principal and due.

That on the 2d of February, 1835, Mr. Leigh, from the Committee on Revolutionary Claims of the Senate, made a report on the claim in favor of the said Daniel Cameron and Margaret, his wife, stating that the claimants ought to be paid the principal due to them, with interest thereon from the time the debt accrued, and the committee reported a bill to that effect.

That on the 15th of April, 1844, a verbal report was made to the Senate in favor of the claim, sustaining the previous reports, and reporting a bill; and again, on the 20th of January, 1845, a similar report was made in the Senate, and a bill introduced accordingly.

That in the House, on the 8th of February, 1849, Mr. Butler, from the Committee on Revolutionary Claims, made a favorable report, accompanied by a bill for the payment of the amount of principal and interest. Favorable action was also had upon the claim in the Senate on the 10th of February, 1851, and a bill introduced proposing to

repeal the provision of the act of June 30, 1834, limiting the payment to $5,727 03, and to settle the claim in conformity with the resolution of Congress of June, 1784; which resolution was "that an interest of six per cent. per annum shall be allowed to all creditors of the United States for supplies furnished or services done, from the time payment became due."

That on the 14th of June, 1854, the Committee on Revolutionary Claims of the Senate again reported in favor of the claim, and accompanied their report with a bill to pay the principal and interest. The said reports of 1834, 1835, 1849, and 1854 were printed; the others were verbal, as your petitioner believes.

Your petitioner further represents that he has intended to set forth truly all the doings of Congress and of the departments upon said claim since 1834, and believes he has so done; and he also believes that the several bills reported to pay said claim to which he has referred failed to become laws for the want of time in one branch or the other of Congress, and not from any unfavorable action by either body.

Your petitioner further represents that he supposes that the act of Congress of 1834, and the statement of the claim at the treasury department, and a part payment of the same at that time, is *prima facie*, if not, indeed, conclusive evidence against the United States of the existence and justice of the claim, and of the amount due at that time. But if your honors should hold it necessary to go behind the act of 1834, he believes that the original papers on file in the Treasury Department and in the office of the Secretary of the Senate will fully sustain the statement of the claim at the department and the several reports of the Senate and House hereinbefore referred to. And your petitioner begs leave to refer to the report of the committee of the House in 1834, and to the several other printed reports to which he has alluded, as since made by committees of the Senate and House, as embracing a statement of the details connected with this claim, should your honors deem it necessary to investigate the details; copies of which printed reports are hereto annexed.

Your petitioner further represents that he has made, as he believes, a thorough examination of the papers and files in the offices of the Secretary of the Senate, and Clerk of the House, and at the departments, in regard to proceedings prior to 1834 upon this claim, and he has not been able to find any action, except as is set forth in said reports above alluded to, and hereto annexed; and in no place has he found the justice of the claim questioned. The only objection which appears to have been made to its payment prior to 1834 was, that it was barred by the statute of limitations. And your petitioner submits that this objection ought not to have operated against it, both because Mr. Bell presented the matter at as early a day as possible, and because, further, your petitioner believes that it was presented before it was barred by the statute, it being stated in the resolution of the House referring the matter to Mr. Gallatin, in 1802, that the claim was presented to the House on the 13th of March, 1794, "before the expiration of the time prescribed by law for exhibiting claims of the like nature."

Your petitioner represents that three or four years ago he and his wife signed some paper to William A. Cameron, for him to endeavor to obtain something on this claim in Congress; but said paper or agreement was without consideration, and your petitioner doubts whether he had any right to sign such paper; and inasmuch as so long a time has elapsed without said Cameron's obtaining anything, your petitioner supposes that he has a full right to revoke the agreement and treat it as at an end, if it ever had any force; and that the most that said Cameron is entitled to receive would be compensation for the services rendered by him, if any have been rendered. Your petitioner, however, understands that said Cameron has represented himself to be the owner of said claim by virtue of said writing; but your petitioner is confident that he never sold or assigned said claim to said Cameron or to any one else, and that said Cameron is not now the owner of said claim or any part thereof. Your petitioner supposes and believes that he, as executor of the last will and testament of said Margaret B. Cameron, is the only legal owner of said claim, and the only proper person to prosecute the same; that Congress ought to pass an act in his favor, as such executor, for the amount justly due, and that it will then be his duty to pay over the same according to law and the will of the deceased.

And your petitioner further represents and submits that there will be due on said claim on the 30th day of June, 1855, the sum of $48,410 33, which amount is arrived at by casting interest on the principal sum of $6,056 34, up to June 30, 1834, the amount due at that time being $27,147 54, and deducting therefrom the sum then paid, being $5,727 03, leaving then due $21,420 51, on which cast interest up to the time specified, June 30, 1855. To this should be added, in the bill to be passed by Congress, interest on the sum of $21,420 51 from the 30th of June, 1855, to the time of payment.

In conclusion, your petitioner would further represent that he and his wife, who is the granddaughter of said James Bell, are poor, with a family of children; that Margaret B. Cameron, your petitioner's testate, died poor, having been supported for some time by your petitioner and his wife; and he would hope that this claim, which he believes to be honestly due and well founded, as above stated, may receive the favorable consideration of this honorable Court, and of Congress.

Dated this 28th day of May, 1855.

RALPH RICHARDSON,
Executor of the last will and testament of
Margaret B. Cameron, deceased.

STATE OF NEW JERSEY, }
Essex, } *ss.*

Personally appeared before me the above Ralph Richardson, and made oath that the facts stated in the above petition are true to the best of his knowledge and belief, this 30th day of May, 1855.

SMITH HALSEY,
Justice of the Peace.

[Reports referred to in the preceding petition.]

IN THE SENATE OF THE UNITED STATES.

JUNE 14, 1854.—Ordered to be printed.

Mr. COOPER made the following

REPORT.

[To accompany Bill S. 399.]

The Committee on Revolutionary Claims, to whom was referred the memorial of the legal representatives of James Bell, late of Chambly, in the province of Lower Canada, deceased, beg leave to report:

That they have examined with great diligence and care the claim presented by the memorialists in their petition and the accompanying documents, and find that it is just and sustained by satisfactory proof. This claim was brought to the attention of the government as early as 1802, when a report in its favor was submitted to Congress by Albert Gallatin, then Secretary of the Treasury. From the last mentioned period until the death of Mr. Bell, in 1814, the claim was constantly prosecuted; but after his death it was neglected by his children, until they learned that the statue of limitation enacted by Congress was no longer rigidly enforced, when they again brought it forward in the shape of a memorial to Congress.

Few cases brought to the attention of the committee have commended themselves to their sense of justice more strongly than this. On the faith of a proclamation issued by Washington himself, and addressed to the people of Canada, at the time of its invasion by General Montgomery, Mr. Bell not only furnished the troops with supplies of arms, provisions, clothing, munitions of war, timber and cordage for the construction of a flotilla, but joined the army in person, and led the assault on Fort Chambly, at the head of a company of volunteers, raised and equipped at his own expense. The fort was captured and Mr. Bell was wounded; but his enthusiasm in the cause of liberty did not abate. His ample means were all at the disposal of the American army, and were contributed freely to ensure the success of the expedition under the orders of Montgomery.

After the fall of that gallant leader under the walls of Quebec, and the retreat of the army, Mr. Bell was taken prisioner, and would have been executed as a traitor but for the influence of certain powerful friends in Scotland, which was successfully exerted with the British general in his behalf. Through their instrumentality he was released; but his fortune was gone; and the remainder of his life passed in seeking the payment of his claim against the government. In 1814

he died in poverty, leaving his claim as a legacy to his children, who have been pursuing it for the last quarter of a century.

In 1834 an act was passed by Congress for the relief of Mr. Bell's heirs. This act directed the accounting officers of the treasury to settle the several accounts of James Bell on equitable principles for moneys advanced, services rendered, and for stores, materials and supplies furnished, &c., with a proviso, however, inserted by the Senate, that the sum to be allowed should not exceed $5,727 03. In pursuance of this act the account was settled, and found to amount to $27,147 54, which was made up of $6,056 34 principal, and $21,091 20 interest. There was thus left due to the heirs a balance of $329 31 principal, and $21,091 20 interest.

That the claim was one on which interest was legitimately due, a reference to its character very clearly makes manifest. In almost all cases of like character interest has been paid by Congress. But should principal and interest both be paid, the committee doubt very much whether the memorialists will even then receive a sum equal to that which their ancestor expended in the first place.

In the course of his long imprisonment, and the compulsion which he was under to keep his vouchers out of the sight of the enemy, by whom they would have been used as evidence against him, many of them, according to the proof before the committee, were lost or destroyed. It is, therefore, believed that a large portion of the original claim remains unsubstantiated, in consequence of the loss and destruction of the vouchers.

For this reason, amongst others, the committee are of opinion that the $329 31, with interest thereon from the time of the former settlement, together with the balance of interest then remaining unpaid, are justly due to the memorialists. They, therefore, report a bill in conformity with this view of the case, and annex to their report the reports of several committees, both of the Senate and House.

IN THE HOUSE OF REPRESENTATIVES, *February* 8, 1849.

Mr. BUTLER, from the Committee on Revolutionary Claims, made the following report:

The Committee on Revolutionary Claims, to whom was referred the memorial of the legal representatives of James Bell, late of Chambly, deceased, praying the balance due from the United States, have had the same, with the accompanying documents, under consideration, and make the following report:

The original merits of this claim have been heretofore examined by committees in the Senate and House, and reports, fully setting fourth the particular circumstances under which the claim arose, and scrutinizing its justness, have been made. The committee refer to a report

made from the committee of the House by Mr. Young, January 16, 1834, and one by Mr. Leigh, in the Senate, February 2, 1835. No one can examine the documents and read these reports without being satisfied that the original claim was highly meritorious. The committee adopt these reports, and print them herewith.

On the 30th June, 1834, an act of Congress was passed for the relief of the heirs of James Bell, directing the proper accounting officers of the treasury to settle the several accounts of James Bell, late of Chambly, in the British province of Lower Canada, on equitable principles, for moneys advanced, services rendered, and for stores, materials, and supplies, &c., with this proviso, however, that the sum to be allowed said heirs shall not exceed the sum of five thousand seven hundred and twenty-seven dollars and three cents. In pursuance of this act, the account was settled by the accounting officers of the treasury, and a balance stated to be due from the United States of $27,147 54. This sum is made up of a balance of principal, $6,056 34, ascertained on settlement by the officers of the Treasury Department of the accounts of James Bell, under the act of 1834, and interest on the same, from the 15th June, 1776, the time of closing the account, to the 30th June, 1834, the time of the settlement and statement of the balance due, by the Auditor, as appears from a certified copy of the account submitted to the committee.

By this act of 1834, the "proper accounting officers of the treasury" were made the arbitrators between the claimants and the United States, and their decision is in the nature of a judgment against the party found to be indebted. Of the amount found to be due, the United States have paid a part only of the principal, and none of the interest. A balance of $329 31 of the principal is unquestionably due, but the interest has not been allowed, because, it is said, the act of 1834 does not authorize it. The act of 1834 says nothing about interest, and therefore, in terms, does not exclude it; and the committee think that a settlement of the accounts, in pursuance of that act, would give the claimants interest. In the first place, the claim is of a highly meritorious character, being "for *moneys advanced*, services rendered, and for stores, materials, and supplies of various kinds furnished, &c., by him (James Bell) to the troops of the United States, and for the construction of vessels-of-war, and for wood for the garrison, including timber, taken to Ticonderoga, and excluding the charge for loss on continental money." Over two thousand dollars of the items allowed is for "money advanced," and the residue is for "supplies" principally. In the next place, the act directs that the accounts shall be settled "on equitable principles." This direction surely would not be complied with if interest were disallowed. It would be inequitable and unjust to refuse it. Debts due from individuals bear interest, and why should not the debts of the government? And in this case, in order to do justice, it is particularly necessary to allow interest, for it is the fault of the government, and not of the claimant, that the principal was not paid long since. The claim was presented as early as 1794, and faithfully pursued until at last a settlement was made and the balance ascertained, which balance was as

justly due on the 15th June, 1776, as it was on the 30th June, 1834, when the account was stated.

It is believed, also, that interest is due according to the laws of Congress and the practice of the Treasury Department. It is stated, in a compilation of the resolves and acts of Congress, called revolutionary claims, made by order of Congress, that, "by the laws or resolutions of the old Congress, *interest* was allowed on all claims, and to all creditors of the United States, from the time payment became due. There are a great number of resolutions of Congress to this effect. Reference is, however, particularly made to that of 3d June, 1784.—(See journals of old Congress, vol. 4, page 443.)

The resolution referred to is in these words, viz: "That an interest of six per cent. per annum shall be allowed to all creditors of the United States for supplies furnished, or services done, from the time the payment became due."

Many cases are enumerated in which interest has been allowed.

Nineteen cases, among which was the one now under consideration, passed the House of Representatives at the first session 24th Congress, with *interest*. These bills passed the Senate during the last two days of the session, but with regard to interest it was agreed, as it is said, that the interest should be stricken out, *without prejudice to the rights of the parties*, each to be adjusted thereafter according to its merits, or by general rule, if any should be adopted. On most of these cases interest appears to have been subsequently allowed; and in the case of James Bell, at the second session 23d Congress, a bill was reported in the Senate for the interest on the claim, but was not acted on. The bill was renewed the second session of the 24th Congress, passed the Senate, but was not finally acted on in the House.

It is stated in the compilation before referred to, which was made in pursuance of a resolution of 11th April, 1836, that seventeen hundred and fifty-four cases had been allowed *with interest*, and fifty-four without interest.

It appears, also, from a report of the Register of the Treasury, made in 1836, shat all certificates of public debt issued by the Register of the Treasury, by the commissioner of army accounts, and by the commissioners for settling the accounts of *individuals* in the several States, and in the quartermaster's, commissary's, marine, and clothing departments, for *services rendered*, or supplies furnished during the war of the revolution, or in fulfilment of promises contained in any ordinance or resolution of the old Congress, were on interest at six per cent. from the termination of the service, or from the time the supplies were furnished.

The committee, being of the opinion that the balance of the principal, viz: $329 31, and the interest as originally stated by the accounting officer, ought to be paid to the legal representatives of James Bell, report a bill accordingly.

IN SENATE OF THE UNITED STATES, *February* 2, 1835.

The Committee on Revolutionary Claims, to whom was referred the memorial of Daniel Cameron and Margaret, his wife, legal representatives of James Bell, deceased, report:

That William Bell and the memorialist, Margaret Cameron, claiming, as the only children and heirs-at-law of James Bell, late of Chambly, in the province of Lower Canada, deceased, preferred their petition to the House of Representatives at the last session of Congress, praying remuneration and compensation for advances of money, supplies furnished, and services rendered by their father, James Bell, to and for the American army in Canada, from the fall of the year 1775, till June, 1776. The merits of the claim seem to have been examined very carefully by the committee on revolutionary claims of that House, which made a full and detailed report on the subject. Upon the case stated in that report, the committee recommended, and the House passed a bill providing for the adjustment of the claim by the proper officers of the Treasury, and for payment of the principal sum which should be found due, with interest thereon from the time when the debt accrued. When this bill came to the Senate, it was so amended as to provide that not more than $5,727 03 of the principal should be paid, and to disallow interest altogether; and with these amendments the act passed for the relief of the petitioners. Upon the adjustment of the account at the Treasury, it was found that the principal sum justly due to the claimants was $6,056 34, to which was applied the sum of $5,728 03, appropriated by the act, leaving a balance of $329 31 principal still due to the petitioners.

The memorialists now ask that the above balance of the principal, ($329,31,) and the interest on the whole debt originally due them, computed from the time the claim accrued, may be allowed and paid them.

The report made by the Committee on Revolutionary Claims of the House of Representatives at the last session on this claim is hereto appended. By that report it appears that moneys were advanced, and sundry supplies furnished by the said William Bell, deceased, to the American army in Canada, between the fall of the year 1775 and June, 1776; and that he also rendered personal services, exposing himself to great losses, to imprisonment, and jeopardy of life. That he took the earliest opportunity practicable to present his pecuniary claims to Congress. That probably the claim and the proofs of it were in fact lodged in the public offices shortly after the peace. That in 1794 Mr. Bell came from Canada to Philadelphia, to attend to the claim in person, and obtain payment of the debt due to him, and found at the treasury no obstacle to his claim but the then statute of limitations. That he thereupon applied to Congress for relief, and though the committee to which the claim was referred reported that, from the particular situation of the claim, and its high merits, the statute of limitations ought to be waived in regard to it, the session passed off without any provision being made for the satisfaction of it. That Mr

Bell afterwards appointed an agent to prosecute the claim for him, who frequently presented it to Congress. That in 1802 a very favorable report was made on it to the House of Representatives by Mr. Gallatin, then Secretary of the Treasury, to whom it was referred; but that report, after suggesting reasons for believing that Mr. Bell had used, perhaps, all means in his power to obtain an early settlement of his claim, referred the expediency of opening the statute of limitations back again to Congress. That the claim was again presented to Congress in 1810, and repelled only on the ground of the statute of limitations. That Mr. Bell died in 1814, and that his children never presented the claim till they found that the policy of the statute of limitations was no longer rigidly enforced, but, on the contrary, was entirely disregarded.

Upon this state of facts, approved as just and true by both Houses of Congress, in the act passed for paying claimants their principal, it seems to your committee that the government ought to have made provision for the satisfaction of the claim, with interest from the time it accrued, as soon as it was presented, which, it is admitted, was probably early after the peace That provision ought to have been made for the payment of the principal, with like interest, in 1794, in 1802, and in 1810, when the claim was presented to Congress and its justice admitted. And that, in rendering justice to the claimants at the late day at which it was at last proposed to be rendered to them, it behooved Congress to render full justice—that is, to pay the claimants the principal due to them, with interest thereon from the time the debt accrued.

Therefore, the committee report a bill, providing for the payment of the balance of the principal due the memorialists, and of the interest stated by the officers of the treasury to be due on the whole amount of the principal debt.

IN THE HOUSE OF REPRESENTATIVES, *January* 16, 1834.

Mr. YOUNG, from the committee on Revolutionary Claims, made the following report:

The Committee on Revolutionary Claims, to whom was referred the petition of William Bell and Margaret Cameron, (wife of Daniel Cameron,) only children and heirs-at-law of James Bell, late of Chambly, in the province of Lower Canada, report:

This claim having been of long standing, and its merits, as presented, depending, in some measure, on the peculiar circumstances attending its origin, progress, and continuance, the committee deem it their duty to the House to give the facts connected with it somewhat in detail.

The petition states, in substance, that in the fall of the year 1775, when the advance of the army of the United States entered Canada,

James Bell, the father of the memorialist, resided in Chamble, or Chambly, in that province, doing business as a merchant; that when the troops entered the province, a proclamation, in the name of General Washington, was distributed amongst the inhabitants, desiring them to remain in quietness at home, or join the army and assist in the cause of liberty. The proclamation also invited the inhabitants to furnish "such supplies as the country afforded," and pledged, not only the government of the United States, but General Washington himself, in express terms, that "ample compensation" should be made.

Relying on the proclamation, and inclined to the spirit of freedom, Mr. Bell immediately attached himself to the cause and fortunes of the United States, and, during the night, assisted in raising those volunteers which it is well known constituted the principal force in the attack on Fort Chambly, and before daybreak joined the very inadequate force which had arrived there under Major Brown; and, being well acquainted with the fortification, led the way in the assault, which soon terminated in the capture of the fort, and the surrender of the garrison, prisoners of war.

Mr. Bell having now forfeited the favor of the friends of the crown, and staked his all in the issue of the struggle, yielded not only his own personal services, but his whole means and credit, to aid and sustain the invading army.

General Montgomery, arriving there soon after, employed Mr. Bell in transporting his boats from Lake Champlain to the St. Lawrence, at La Prairie, and, before he left that vicinity, from a knowledge of his zeal, activity, and usefulness, constituted him a kind of public agent to superintend the artificers employed in repairing the fortifications there, and to procure the materials, and also to procure materials for building certain gondolas and other boats ordered to be built by a resolution of Congress, in which service he was afterwards continued by regular appointments, from General Wooster and other general officers, till the final departure of the United States troops from that place in June, 1776, during all which time, in addition to his personal services, he furnished supplies to the garrison, of almost every kind, from his own store, in the neighborhood, together with many materials for the purposes before mentioned, and for a considerable time paid the workmen under his superintendence out of his own funds. And these services, supplies, and advances, together with the expense in the transportation of the boats to the St. Lawrence, as before mentioned, constitute the claim now under consideration. The representation that Mr. Bell assisted in raising the volunteers, and led the army in the assault, is not expressly stated in the testimony; but his zeal, activity, and readiness to *do* and *supply* everything in his power is very fully and distinctly proved, as well as implied, from the language and nature of the correspondence with him while thus employed.

All the other representations which are in any way material to a general understanding of the claim, and its merits thus far, are confirmed by the history of those times, the proclamation of General Washington, on file with the petition, the correspondence of the officers of

the army with Mr. Bell at the time, together with their special certificates to some of the larger items, and their general certificates since, embracing the whole time, and recognizing their general correctness.

The petitioners (by way of showing that their claim ought not to be prejudiced because payment has been so long deferred) further state what is a well known fact, that our troops were unexpectedly under the necessity of abandoning and destroying the works at Fort Chambly, and other places, and of retreating with all despatch out of the province, leaving no time or opportunity for settling accounts. Mr. Bell, however, collected and arranged his papers as well as the circumstances would permit, overtook the retreating army at St. John's, and delivered over his accounts to General Hazen, who engaged to see them speedily adjusted and settled with the United States government, and the avails transmitted. The circumstance is of considerable importance in the further history of this case, and its claim to attention and favor is distinctly stated by General Hazen, with the particular circumstances of the manner of his adjusting and bestowing them for safe keeping.

A British force now took possession of Fort Chambly, and re-established the authority of the crown in that region, and Mr. Bell, as is alleged, and as might well be expected from his recent conduct, was immediately arrested for high treason, and thrown into prison, and after a long confinement escaped with his life, through the intercession of some Scotish friends, during a temporary relaxation of rigor, while Sir Guy Carleton was absent in England, and that on condition of his keeping himself in obscurity. As soon as peace was established between the two governments, and Mr. Bell was released from these embarrassments, he renewed his exertions to obtain compensation for his claims, and sent a power of attorney to General Hazen, with full powers to represent him, and close his accounts with the United States; but before anything was effected, General Hazen was seized with the dumb palsy, as is a well known fact, and continued for some years unable to either write or speak. Finding his affairs in this situation, in 1794 Mr. Bell came from Canada to Philadelphia to attend to his claim in person with the government. But now he found his claim barred by the statute of limitations; and though it seemed to be admitted that his account had been previously presented at the proper office, and during the suspension of the act of limitation, yet it was decided that the suspension could not be applied to him, as he was not an inhabitant of the United States. Mr. Bell then applied to Congress for redress, and though the committee to whom it was referred reported that, from the particular situation of the claim, and its high merits, the statute of limitations ought to be waived with regard to it, the session passed off, and Mr. Bell was obliged to return home disappointed, discouraged, and poor, and unable afterwards to attend on Congress. He, however, appointed one Peter Mills his agent to prosecute his claim, who, it seems by the files, frequently presented it to Congress, and in 1802 a very favorable report was made on it to the House of Representatives by Mr. Gallatin, then Secretary of the Treasury, to whom it had been referred; but this

report, after suggesting the reasons for believing that Mr. Bell had used, perhaps, all the means in his power for an early settlement of his claim, referred the expediency of opening the statute of limitations back on Congress again. In 1810 his claim appears again to be before Congress, and the claim again critically examined, and its merits earnestly urged; but still the statute of limitations resisted every attack and every appeal. In 1814 Mr. Bell died in poverty, broken down with age, disappointment and misfortune. His children, learning that the absolute dominion of the statute of limitations had been shaken, have taken courage, and again presented this claim.

From a careful consideration of these facts, the committee feel warranted in coming, in this stage of the investigation, to these general conclusions. In the first place, that, in the language of Mr. Gallatin, in the report referred to, Mr. Bell "did, in the years 1775 and 1776, render services and furnish supplies, to an indefinite extent and amount, to the continental army in Canada, and that it is probable that he has never received any compensation." And, in the second place, that the claims ought not to be prejudiced by this long lapse of time, "on account of," in the further language of Mr. Gallatin's report, "the precipitate retreat of the American army from Canada; of the petitioner's being a resident in that province; and of his having used, perhaps, the best means in his power, under those circumstances, to have his accounts settled at an early period."

Having come to these general conclusions, the committee will proceed to examine the items of the account and their vouchers more particularly. These several accounts, as before stated, extending during the whole time the American army had possession of Fort Chambly, are in separate bills, made up from one date to another, mostly under separate heads, according to the nature of the accounts, whether materials, advances, or supplies; having also reference to the several officers who successively or occasionally had the command or direction of the plain or subject matter. They exhibit, also, the several items, with the date of delivery, and generally the person to whom delivered; and in the case of the advances to the artificers, the days of service, the separate prices of each, together with the particular kind and plan of employment in which they were severally engaged; in short, they exhibit every appearance of being from the original entries at the time, and the bills now exhibited appear, from various memorandums on them, and references to them in reports made, to be the claims as originally presented. Some of the more prominent items are certified by officers knowing to their delivery. General Hazen, Major Butterfield, Captain Hamtramck, and others, specify many of the articles Mr. Bell was in the habit of furnishing, and bear testimony to his readiness, at all times, to furnish whatever was in his power; and each account is duly sworn to by Mr. Bell himself. This, it must be presumed, is the amount of testimony his case was susceptible of; for it will be recollected that General Montgomery was slain in a few weeks after he left Fort Chambly; General Thomas died in the spring, not long after he arrived in Canada; General Wooster received his mortal wound early the next spring, and General Arnold was soon in a situation not to be consulted on such subjects; and it might be

added, if necessary, that a number of officers, Major Butterfield and others, who had been on duty in that region, were prisoners to the British Colonel McLeon for some time near the close of the campaign. General Thompson and Colonel Irwin were also made prisoners about the same time. By a resolution of Congress, the revolutionary officers in the southern department, or a portion of them, were permitted to substantiate their claims by their own oaths, from the necessity of the case, it being utterly impossible to procure regular vouchers to all their transactions in such a confused state of warfare as prevailed at many times in many places. Mr. Bell was also an officer in whom the government, or its officers, had placed special confidence, and was situated amidst similar, and in many respects greater difficulties. There seems to be no reason, therefore, why he should not receive similar privileges. In the case of the heirs of Francis Cazeau, settled as late as 1817, the precedent is much stronger in Mr. Bell's favor, being almost a parallel case in all parts. Mr. Cazeau was not a known officer, to be sure, but one in whom the government placed special confidence, as the testimony in his case shows; his was then a single case like this. He resided in Canada, and had furnished supplies a part of the same time with Mr. Bell, for a portion of the army further down the St. Lawrence.

In the progress of this claim the oath of Mr. Cazeau was directed to be received in support of it by a special resolve of Congress.

The committee have taken into consideration some objections that might arise in view of this claim.

It might be inquired, in the first place, why these supplies were so little connected with the proper contracting officers' accounts, and were not furnished through them. It appears, by the correspondence on file, and the style of the accounts seem to imply it, that a particular discretion was allowed to Mr. Bell, and confided to him; and that, for certain reasons, probably on account of the state of things there, for the same appears in Mr. Cazeau's case, he was treated as somewhat independent of ordinary drections, as it appears that orders and directions were often given to him to be communicated, or not, as he might see fit, to the commanding officers at the fort. It may also be noticed here that it appears, incidentally, from papers on file, that he had other transactions with the quartermaster, and that certain articles, which are proved by Mr. Bell's certificates to have been delivered to the garrison, are not charged in his present account, because they were to be accounted for by the quartermasters with whom he had in these cases contracted.

Again, it may be inquired whether it is possible or probable that the charges in question have remained unpaid. The facts just stated relieve the difficulty, in some measure, by showing that not all the supplies which Mr. Bell furnished at the time were charged or claimed in this account. And, as a more general consideration, it may be remembered that the testimony clearly shows that these accounts were delivered to General Hazen, at St. John's, at the time these services and supplies unexpectedly closed—an officer, probably, who knew as much about the account, and the state of things as they existed, as any other; and that they have been claimed and insisted on, at short in-

tervals, ever since; and what is more conclusive, were critically examined, as the papers show, at Philadelphia, in 1794, when the returns of the army, and the accounts of the disbursing officers, were then in existence, and any advances by them to Mr. Bell would have appeared as part of these claims. Yet no one account, certificate, report, or examination, of which so many have been made in this case, under the scrutinizing feeling of those times, including the scrutinizing eye of office of Mr. Gallatin, has cast the least shade of suspicion or doubt on the genuineness and correctness of these accounts as presented, except in one item, and that the committee are not disposed to allow, not for any doubt of the accuracy of the charge itself, but on account of the settled practice of the government. This charge is for loss sustained on continental money paid him by the officers and others on their private accounts. The committee, therefore, under all the circumstances of this case, conclude that both justice and precedent, the pledge of General Washington, and the faith of the government, require that this case should now be settled at the proper offices where such claims are usually examined and settled.

The committee therefore report a bill in conformity with the principles expressed in this report.

IN THE COURT OF CLAIMS.—No. 16.

ON PETITION OF RALPH RICHARDSON.

Suggestions in answer to Solicitor.

I. It is fairly to be inferred, from the evidence, that the claim was presented for payment prior to the resolution of Congress of July 23, 1787.—(See *Bell's power of attorney to General Hazen*, dated July 17, 1784, page 35 of papers transmitted from the treasury; also, General Hazen's letter dated August 12, 1784, p. 26 of papers; also, his letter of May, 1785, p. 19 of papers.)

The *vouchers* at that time may not have been in sufficient form to warrant the settlement and payment of the claim, but a request or demand for a settlement would take the case out of the operation of the statute. The resolution of July, 1787, required only *abstracts* of the accounts to be presented.

II. If the claim was not presented by General Hazen in due time, still, being in his hands, and he an officer under the government, the statute should be suspended, and the act of July 12, 1793, would save the claim.—(See House report of April, 1794, page 27 of papers.)

III. Mr. Bell, being out of the country, (a resident of Canada,) and in a situation not to be informed of the resolution of 1787, ought not to be barred by it. It would be a fraud upon him were such the case. He is not presumed to know the law like citizens of the United States. It is well settled that, where a party is kept in ignorance of his rights by fraud, the statute shall not run against him. He is like a person beyond seas.

IV. Mr. Gallatin's construction of the act of 1792 is too limited. A liberal construction of that act would not bar this claim. The House, by their resolution of February 12, 1802, p. 36 of the papers, declare that it was presented within the time prescribed by law for exhibiting claims of like nature.

V. The act of June 30, 1834, and the statement of the claim at the Treasury Department at that time, and a part payment of the same, settles the legal existence and justice of the claim, and the Court will not go behind that settlement. That act was not a gratuity, but an appropriation made to pay a debt. More was found due than the appropriation amounted to.

VI. The claim is proved, by the best evidence of which the case is susceptible, by the sworn statement of Mr. Bell and the original certificates of officers of the army, all of whom are dead.

VII. All the papers show the undoubted merits and equity of the claim, and the pledge of the faith of the government by General Washington and other officers for its payment.

VIII. No question is raised in regard to the amount due, and a bill should be reported for the amount to be paid to the rightful owner or owners of the claim.

A. H. LAWRENCE.

IN THE COURT OF CLAIMS.

ON THE PETITION OF RALPH RICHARDSON.

Brief of United States Solicitor.

This is a claim for supplies, money, materials, labor, &c., furnished by James Bell, of Chambly, in Lower Canada, during the revolutionary struggle in 1775 and 1776, for the service of the United States.

The claim is barred by the resolutions of July 23, 1787, and by the act of March 17, 1792.—(See the report of Mr. Gallatin, Secretary of the Treasury, dated March 2, 1802, among the papers transmitted by the Register of the Treasury.)

If the claim were not barred, the evidence in support of it is confessedly not according to the requirements of law.—(See Young's report attached to the petition; and also the report of Mr. Gallatin, above referred to, in which Mr. Gallatin asks Congress if it should deem it proper to remove the bar of the statute of limitations, to decide, also, what sum should be paid the claimants, as the vouchers were insufficient; and this, he said, it was entirely competent for Congress to do, as any sum now paid would be a gratuity.)

Congress has accordingly passed an act, approved June 30, 1834, granting such sum as the accounting officers should think proper to allow, not exceeding $5,727 03, which was construed as an allowance of that amount, as such grants are uniformly construed. There is, therefore, no legal or just claim against the government.

M. BLAIR, *Solicitor.*

IN THE COURT OF CLAIMS.

RALPH RICHARDSON *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petitioner, representing himself to be the executor of the will of Margaret B. Cameron, deceased, states the following case:

In the years 1775 and 1776, James Bell, of Chambly, in Lower Canada, rendered services and furnished supplies to the American army, then in Canada, under the proclamation of General Washington, amounting to $6,056 34, no part of which was paid him, although he made strenuous efforts to procure it. On the 27th of April, 1814, he made his will, giving to his children six livres apiece, in addition to what he had previously given them, and to his wife, Margaret Bell, all his other property, and died subsequently in the same year. On the 15th of January, 1828, Margaret Bell, by deed, assigned to her daughter, Margaret B. Cameron, the wife of Daniel Cameron, all her right and title to all accounts due from the United States to her husband, James Bell. On the 22d day of July, 1844, Margaret B. Cameron, after the decease of her husband, by her will, which was proved on the 11th of September, 1844, gave all her estate to her daughter, Caroline M. Richardson, the wife of the petitioner, and appointed him her executor, to which office he has also been duly appointed by the proper court, and as representing all the rights to the claim of James Bell, the petitioner prays it may be allowed to him in his capacity as executor.

On the 30th of June, 1834, (6 Stat. 598,) Congress passed an act for the relief of the heirs of James Bell, by which the proper accounting officers of the treasury were directed "to settle the several accounts of James Bell—who was superintendent of workmen and artificers in the service of the United States at Chambly—on equitable principles, for moneys advanced, services rendered, and for stores, materials, and supplies of various kinds, furnished by him to troops of the United States; and for the construction and repairs of the fortifications at Chambly; the construction of vessels-of-war; and for wood for the garrison, including timber taken to Ticonderoga, and excluding the charge for the loss on continental money; said accounts commencing in October 1775, and ending June 15, 1776, and directing the amount found due to be paid to the heirs-at-law of James Bell, *provided* that the sum to be allowed said heirs shall not exceed $5,727 03."

In pursuance of this act, on the 3d of October, 1834, the several accounts of James Bell were settled at the treasury.

The several items amounted to the sum of.....	$6,056 34
To which was added an item for interest from June 15, 1776, to June 30, 1834.....	21,091 20
Making the whole claim.....	27,147 54

Against the item for interest is the following memorandum, made in the Auditor's office. "Not admitted—not being authorized by law."

The account was adjusted in the Auditor's office in the following manner:

"Amount brought over.....	$6,056 34
"Deduct amount of the within account, exceeding the amount appropriated by act of Congress, of 30th June, 1834, for satisfaction of this claim.....	329 31
"Leaving amount payable of said act of 30th June, 1834, pages 155 and 156.....	5,727 03

"AUDITOR'S OFFICE, *October* 3, 1834.

"WM. PARKER.

"COMPTROLLER'S OFFICE, *October* 3, 1834.—Examined.

"WM. ANDERSON."

This sum of $5,727 03 was paid to Margaret B. Cameron and her husband, leaving then due, as the petitioner claims, the sum of $21,420 51.

The proclamation of General Washington to the inhabitants of Canada, after appealing to them for their support in our contest with Great Britain, contained the following promises and statements: "I have detached Colonel Arnold into your country with a part of the army under my command. I have enjoined upon him, and I am certain that he will consider himself and act as in the country of his patrons and best friends. Necessaries and accommodations of every kind which you may furnish he will thankfully receive and render their full value. I invite you, therefore, as friends and brethren, to provide him with such supplies as your country affords, and I pledge myself not only for your safety and security, but for ample compensation."

On the 16th of January, 1834, the House Committee on Revolutionary Claims made an elaborate report recommending that the claim should be settled at the proper offices. In pursuance of this report the act of June 30, 1834, was passed. After the accounts had been adjusted at the treasury, on the 2d of February, 1835, the Senate Committee on Revolutionary Claims reported a bill for the balance of the principal due the memorialists, and of the interest stated by the officers of the treasury to be due on the whole amount of the principal debt.

On the 8th of January, 1849, the House Committee on Revolutionary Claims made a report concluding as follows: "The committee being of the opinion that the balance of the principal, viz: $329 31, and the interest as originally stated by the accounting officers, ought to be paid to the legal representatives of James Bell, report a bill accordingly."

On the 14th of June, 1854, the Senate Committee on Revolutionary Claims made a report, stating that "the committee are of opinion

that the $329 31, with interest thereon from the time of the former settlement, together with the balance of interest then remaining unpaid, are justly due to the memorialists."

These reports contain an elaborate investigation of the claim, and we refer to them not as authoritative expositions of the law, but as the opinions of learned and eminent men upon the questions now before us.

The first material question in this case is, whether the claim is now barred by the resolutions of 23d July, 1787.

The resolution of July 23, 1787, provided that all claims not presented to the Comptroller of the Treasury within one year should be precluded from settlement or allowance.

It appears from the journals of the House of Representatives, under date of February 12, 1802, that the petition of James Bell for the settlement of his accounts having been presented, and that "the accounts and vouchers in support thereof having been laid before this House on the 13th day of March, 1794, before the expiration of the time prescribed by law for exhibiting claims of the like nature: ordered that the said petition, and the documents accompanying the same, be referred to the Secretary of the Treasury, with instructions to examine the same, and report his opinion thereupon to the House."

On the 2d of March, 1802, Mr. Gallatin, the Secretary of the Treasury, reported his opinion to be, that the claim was barred by resolution of July 23, 1787.

Undoubtedly the claim was barred, and the question arises as to the operation of the act of June 30, 1834, upon the bar created by the resolution.

The argument and reasonings upon this point in favor of the petitioner may, perhaps be fairly stated as follows:

This act directs the officers of the treasury to settle the several accounts of James Bell, upon equitable principles, for moneys advanced, services rendered, and materials furnished to the United States, and that the amount found due should be paid to the heirs-at-law of James Bell; but the bill contained a proviso that the sum to be allowed the heirs should not exceed $5,727 03. It is very evident that the officers of the treasury were not authorized to settle the whole accounts of James Bell upon what they should consider to be equitable principles; for, whatever might be their views upon the equity of the claim, they were precluded from allowing him more than $5,727 03. This court has already settled, in the case of Abel Gay *vs.* The United States, that when the Secretary of the Treasury was authorized to settle certain accounts upon the principles of equity, it did not necessarily follow that interest should be allowed upon the amount found due. In that case, the Secretary had an unlimited authority to settle the accounts upon what he should consider to be principles of equity, and, having that authority, he did not see fit to allow interest; but in the present case, the officers of the treasury had no such unlimited authority, for they were precluded from allowing more than the sum specified. If that sum should fall short of the amount of the debt found to be due, of course they had no jurisdiction over the question of interest, and of course the petitioner cannot

be met by the objection that the officers of the treasury, having the power to act upon principles of equity, had exercised that power in regard to the question of interest, and that their decision is final. It is argued that the operation of the act of 1834 is necessarily to remove the bar created by the resolution of 1787, for unless that effect be given it, it is entirely futile and unmeaning. Without considering the bar to be removed, no inquiry whatever could be had into the claim. A debt barred by the stringent operation of the statute of limitations cannot be considered to be barred on "equitable principles," and so long as this claim was barred by the resolution, no effect could be given to the act of Congress. It is said, also, that the impression inevitably made upon every mind by the act is, that Congress intended to take the case out of the operation of the statute, so far as regarded the sum of $5,727 03, and in pursuance of the authority conferred by the act, that sum and more was found by the officers of the treasury to be due on the 15th of June, 1776. It may also be argued that as the sum actually found to be due at that date was $6,056 34, as to the difference between the two sums, which is $329 31, the bar is not removed by the act of 1834. It is supposed that as it was competent for Congress to take the case out of the statute of limitations, as to the whole, or as to part of the claim, they saw fit to remove the bar as to a part only. This sum, then, of $329 31 would then still be considered as barred by the resolution of 1787, but so far as regards the sum of $5,727 03, that would not be barred, and the evidence is, that it was due on the 15th of June, 1776. Being then due, the claimant's position is, that it comes within the operation of the resolution of June 3, 1784, which provides "that an interest of six per cent. per annum shall be allowed to all creditors of the United States for supplies furnished, or services done, from the time that the payment became due;" and that the interest thereupon is now due to the claimant from the United States.

But there is another view to be taken of the operation of the act of 1834, which may lead us to a different conclusion.

There is no doubt that where a claim against the United States is barred by a statute of limitations, it may be revived, like any other claim, between individuals, by an act of Congress. But the same principles which are applicable in a case between private persons must govern the relations between an individual and the United States. It is, therefore, necessary to inquire into the law which should govern such a state of facts as exists in this case.

Since the decision in Whitcomb *vs.* Whiting, (2 Doug., 652,) it is well settled that an acknowledgment or new promise may be inferred from payment of a contract within six years, or from the payment of a smaller on account of a greater sum of money due from the party making the payment to the party to whom it is made. In the case of Tippits *vs.* Heane, (2 Tyrwhitt, [Exchequer,] 772,) it was said by Mr. Baron Parke, that "to take the case out of the statute it must be shown that the part payment was made on account of a larger debt, the principle on which it takes the case out of the statute being that it admits a greater debt to be due." We do not understand that this doctrine has ever been controverted, and if there be

anything in a given case to show that the part payment did not admit a greater debt to be due, such part payment would not take the case out of the statute. Now, in the present case, although the act of 1834 authorizes the sum of $5,727 03 to be paid to the heirs of James Bell, there is an express provision that no larger sum should be paid them. It is an admission that that sum is due, but it is not an admission that any greater sum is due, or that that sum was paid on account of a larger debt. It cannot be inferred from the act that Congress intended to pay that sum merely as a part of a larger debt which they admitted to be due, because, after directing the officers of the Treasury to settle the accounts of James Bell, they authorize the payment of the sum mentioned, and expressly prohibit the payment of any larger sum. The mere fact, then, that this sum has been paid, considering the authority by virtue of which it was paid, does not authorize the conclusion that it was paid on account of a larger sum admitted to be due.

It may further be remarked, that a simple acknowledgment of the justice of the debt in question may be so made as to amount in law to an implied promise.—(Leroy *vs.* Crowninshield, 2 Mason, 151.) An admission of a debt is considered as equivalent to a new promise made on a meritorious consideration of the antecedent liability, and, therefore, affording a new and distinct cause of action.—(Bryan *vs.* Horsman, 4 East., 399; Ward *vs.* Hunter, 6 Taunt., 210; Pittan *vs.* Foster, 1 B. & C., 248; Bell *vs.* Morrison, 1 Pet., 351.) If a simple acknowledgment of the debt as then existing is proved, a promise to pay it may fairly be presumed from the reason and justice of the case and the probable intention of the party making it. But if the acknowledgment is accompanied by an express declaration of the party that he does not intend to pay, and that he cannot be compelled to pay by law, the presumption of a promise, it is plain, is completely rebutted. In the case of A'Court *vs.* Cross, 3 Bingh., 326, Mr. Chief Justice Best said, "there were many cases from which it may be collected, that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment would not take the case out of the statute of limitations." The same judge reiterated this doctrine in the subsequent case of Scales *vs.* Jacobs, 3 Bing., 683. In the case of Read *vs.* Wilkinson, 2 Wash., 514, Mr. Justice Washington said, that "anything which is added tending to negative a promise must be considered as qualifying every other expression, and as the whole must be taken together, it amounts to a refusal to pay, which can never be construed into a promise to pay." In the case of Bell *vs.* Morrison, before cited, Mr. Justice Story adhered to the rule, that the acknowledgment must show positively that the debt is due either wholly or in part, and must be unqualified, and that the acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. In the case of Sands *vs.* Gelston, 15 Johns, 511, it was decided that if at the time of the acknowledgment it was qualified in a way to repel a presumption of a promise to pay, then it was not evidence of a promise sufficient to revive the debt. In the case of Purdy *vs.* Austin, 3 Wendell, 187, it is stated, in the opinion of the court delivered by

Mr. Justice Marcy, that anything going to negative a promise is to be regarded as qualifying every other expression used. In the case of Bailey *vs.* Crane, 21 Pick., 323, Mr. Justice Morton, speaking of a certain letter relied upon to take a case out of the statute of limitations, says: "although it may perhaps imply an acknowledgment of indebtedness, yet, if so, it contains such qualifications and explanations as to exclude any implication of a promise to pay." In the case of Deforest *vs.* Hunt, 8 Conn., 185, Mr. Chief Justice Hosmer says: "an unqualified and unconditional acknowledgment of a debt as originally just, and yet subsisting, removes the bar of the statute of limitations." It is unnecessary to accumulate authorities upon this point. It is sufficient to say that such is now the universally received construction of the effect of an acknowledgment, however much courts have heretofore striven to avoid the bar created by the statute by anything which might be construed into an acknowledgment.

Now the act of 1834 is undoubtedly an express acknowledgment in substance that the sum of $5,727 03 is due to the heirs of James Bell, because it authorizes that sum to be paid them by the accounting officers of the treasury; but it excludes the conclusion that any greater sum is due, because it prohibits the officers of the treasury from paying any larger sum. It authorizes the accounts of James Bell to be settled, and the amount found due to be paid his heirs, provided that the sum to be allowed them shall not exceed $5,727 03. It is not an acknowledgment that any greater sum than that is due, but an assertion that no greater sum is due, and, consistently with the decisions to which we have referred, it is an acknowledgment that a certain sum is due, qualified by the assertion that no more is due than the sum specified. The petitioner, therefore, has no cause of action.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 59.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

J. C. BUCKLES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions presented by the claimants transmitted to the House of Representatives.
3. Documents received from the Post Office Department, transmitted to the House of Representatives.
4. Solicitor's brief.
5. Opinion of the Court adverse to the claim.
6. Other papers relating to the case, received from the House of Representatives, in answer to a call from the chief clerk of the Court of Claims, are returned to that House in a separate envelope.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

[L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

To the honorable the Judges of the Court of Claims:

The petition of J. C. Buckles, of Louisville, Kentucky, respectfully sheweth: That in the years 1847, 1848, and 1849, your petitioner was a contractor under the Postmaster General for the transportation of the

mail of the United States, under three several contracts; official copies of all which contracts are now on file in your honorable Court, and to which he prays leave to refer as part of this his petition. They are respectively numbered 5005, 5103, and 4077. Under the first the contractor undertook to carry the mail between Louisville, Kentucky, and Shawneetown, Illinois, by steamboat, a distance of one hundred and fifty-six miles, three times a week, forwards and backwards, for the sum of $4,560 per annum, supplying seven post offices, all on the Kentucky side of the river. Subseqnently, for the accommodation of the residents on the northwest side of the river, *the Postmaster General directed the route to be extended to Paducah, in Kentucky*, a distance of about three hundred and fifty miles, and the mails to be delivered at fifteen separate and additional offices, including several in Indiana. The additional service was duly and regularly performed for a period of six months before any formal contract for the same was made between the parties. Your petitioner has received no remuneration for this extension of service during this entire period of six months, as he believes on the ground that no provision has been made by law for any such compensation, before a contract for the same had been formally executed. Your petitioner believes that he was entitled to receive for this additional service a further compensation, estimated at a pro-rata increase upon the terms of his prior contract. An arrangement was finally concluded under the pressure of circumstances, disclosed in the papers, by which your petitioner found himself compelled, under the apprehension of serious losses to enter into the contract upon this additional route, No. 4077, at the very reduced rate of $3,000 per annum. While conceding that from the date of the actual contract, in June, 1848, he is restricted to the same actually agreed upon by the terms of that contract, he submits to your honorable Court, that for the six months' service rendered prior to the date of that contract he is justly and equitably entitled to receive a remuneration proportionate to the additional service required of, and performed by him, before the terms of the contract had been agreed upon. Upon these routes your petitioner further claims an allowance for the sum of four hundred and six dollars, the amount actually paid by him for carrying the mails to and fro from the steamboat and post offices, where these mails were to be delivered, and from which other mails were to be received. This sum, with interest upon his outlay, he considers as justly due to him, and which ought to have been returned to him several years since.

Your petitioner had also another contract for the transportation of the mail from Louisville to St. Louis, route No. 5103. From the regular pay provided by the contract for this route, the department in adjusting the account has deducted the sum of $1,411 for fines and forfeitures for not delivering the mails regularly, in conformity with his contract. Your petitioner states the fact and believes that the evidence now on file in your honorable Court fully sustains the truth of his averment, that every exertion was made by him, and those in his employ, to perform with scrupulous exactness the terms of his contract, and that whatever omissions occurred were occasioned by causes wholly beyond his or any other human control; by the low state of the water, fogs, ice, and other providential impediments. For delin-

quencies arising from such causes, it would be the height of injustice to make him responsible or to mulct him in damages, and he therefore submits to your honorable Court that he is justly entitled to have the amount thus deducted from his pay returned to him, and with interest from the time when such charges were improperly made. All these matters were submitted to Congress by your memorialist, and in April, 1854, a report was made by the committee of the House of Representatives, No. 129, accompanied with a bill, No. 323, which was subsequently enacted into a law. Your petitioner prays leave to refer to these proceedings as part of his cause, although he submits that upon the matters submitted, the report of the committee, and the act which was passed in conformity with this report, gave him far short of what justice required.

He also prays leave to submit to your honorable Court another item of claim which has never been brought before Congress, but which grows out of, and is therefore intimately connected with, the foregoing statement of facts: It has been shown that your petitioner had three separate and distinct contracts with the Post Office Department, No. 5005, No. 5013, and No. 4077. Each of these contracts contains a stipulation that the Postmaster General reserves the right to discontinue any route at his discretion, but with the distinct provision, that in case of such discontinuance before the expiration of the time provided in the contract it shall be done on the payment of one months' full pay to the contractor. Each of the aforesaid three routes was thus discontinued; No. 5005, by order of the department, on the 14th February, 1849, and the service ceased on the 1st March, 1849; No. 5103, discontinued by order dated February 5, 1851, and the service stopped February 10, 1851; No. 4077 discontinued February 14, 1849, and the service ceased 28th February, 1849.

Under the positive terms of these several contracts your petitioner was entitled to receive one months' pay on each of them at the time the service ceased. No such payment has ever been made to him, and he now asks it at your hands.

J. C. BUCKLES.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss.*

Personally, this day, came before me, a justice of the peace in and for said county, the above named J. C. Buckles, who made oath in due form of law that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

B. K. MORSELL, *J. P.*
R. S. COXE,
JNO. M McCALLA,
Attorneys and Counsellors at Law.

IN THE COURT OF CLAIMS.

J. C. BUCKLES *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

The petition presents several distinct claims, which will be noticed in the rder they are presented in the petition.

First. A claim for supplying the offices on the Indiana shore during his first contract to carry the mail to Shawneetown. To this claim several objections exist: 1st. The alleged service in delivering the mail on the Indiana shore was not authorized by the department, but was voluntarily performed by Mr. Buckles, at whose instance these mails were made up and delivered to him by the postmaster at Louisville without authority from the department, and pending an inquiry in the department into the propriety of discontinuing the land routes by which these offices were supplied, and with the distinct information that a contract would not be made with him unless the land routes were discontinued, and then only for the amount that could be saved to the department.—(See statement of Leach, and letters therein referred to, particularly the letters of December 11, 1847, and January 8, 1848, of S. R. Hobbie, and deposition of T. J. Read, postmaster at Louisville.) Under this state of facts there was no express contract for the service alleged to have been performed in carrying the mails to the Indiana offices, and none can be implied by law.—(See 23d sec. of act of July 2d, 1836, 4 Stat. at L., page 85; Starke on Evidence, vol. 2, pages 92–93.) To support an assumpsit, it is necessary to aver and prove the services were rendered at the request of the department; because no man or party can make another his or their debtor without his consent; here no consent was given by the department, and no consent can be implied, except on the hypothesis that a contractor may assume the duties of the Postmaster General, and supply at the contractor's discretion post offices which, in the discretion of the Postmaster General, are otherwise supplied; such a position will destroy all subordination in the department, throw its business into confusion, and greatly increase the expenses of the government.

2d. Because, although this claim could not create any lawful demand on the government, yet Congress has paid the petitioner the sum of $1,500 for services for six months prior to the 10th day of June, 1848, as estimated in the report of the House committee, No. 129, April 5, 1854, and makes part of the sum of $3,006, approved by act of August 5, 1854, 10 Stat. at Large, page 819; and this appears by letter of T. J. Read, postmaster at Louisville, April 6, 1848, from which it appears that on the 17th of November, 1847, J. C. Buckles applied to him, Read, for the mail to six Indiana river post offices, and carried them until the 6th of December, 1847; on the 25th of December; he re-commenced supplying these offices, and continued to do so until the 15th of January, 1848; on the 27th of January, 1848, he again took the mail to these offices and to four others, including Paducah. From this it appears that, to make the six months' service for which Congress has, as matter of grace and favor, paid him $1,500, this service must be included.

Second. He claims for six months' service prior to the 10th day of June, 1848, the date of his second contract, at the rate of his first contract. It appears his first contract was entered into the 15th of December, 1847, to take effect from the 1st of October, 1847, to carry the mail from Louisville to Shawneetown, a distance of 156 miles, by certain post offices, at $4,560 per annum. By his second contract he was to carry it to Paducah at $3,000 per annum.

It appears from the letter of Thomas J. Read, that on the 27th of January, 1848, J. C. Buckles applied for and carried the mail to Paducah and other points; and it appears from the letter (Read's) of the 18th of January, 1849, that in the spring of 1848 Buckles was running a line of steamboats to Paducah. This must have been a private enterprise of Buckles, not invited or encouraged by the department. He sought the mails, and without any authority from the department procured them from the postmaster at Louisville, and carried them with the warning from the department, in the letter of January 8, 1848, that nothing would be paid for the service until the land routes were discontinued, and they could not then be discontinued, because the irregularity of his own service would probably require his contract to be abandoned; and that the highest payment that could be made was $625. The Congress of the United States, as matter of grace and favor, gave him $1,500 for six months' service, which was at the rate of his second contract of 10th of June, 1848, for this very service. He now insists on a claim for this six months' service, at the rate of $4,560 per annum, the contract of 15th December, 1847, the difference being $780.

1st. On behalf of the United States, we deny he has any legal claim for this or any other sum for this service, on the grounds stated in resisting the claim 1, and the authorities there stated; also the letter of the Postmaster General, of the 3d of February, 1852, is referred to.

2d We insist, if any contract is to be inferred from the correspondence, it is the compensation for this extra service, at the rate of $625 per annum.

3d. We insist that extra service to Paducah was only performed from the 27th of January, 1848, to 10th of June, 1848, four months and thirteen days; and on any ground of allowance, the rate could not exceed the rate of $3,000 per annum, making $1,125, and for which, and for delivering the mail thirty-nine days at the six post offices between Louisville and Shawneetown, Congress has paid him $1,500.

Third. He claims $406, which he says he paid for carrying the mails to and from the steamboats. The letter of Mr. Hobbie, of December 11, 1847, informed Mr. Buckles that, if any contract was made, this duty was to be performed by him.

1st. While, then, it is insisted that the law will not imply a contract to pay for any part of this service, it is specially insisted that a contract cannot be implied to pay this sum.

2d. It is also insisted that, as a matter of grace and favor, Congress, in the appropriation of $3,006, in the act of 4th August, 1854, did pay this sum. It is estimated in the report made by the committee as part of the $3,006.

3d. In his contract, Buckles agreed to take the mail from and deliver

it to each post office now on the route, or hereafter to be established, and not more than a quarter of a mile from the landing.

Fourth. He claims $1,411, fines imposed by the Postmaster General for failing to perform his contract, &c. On this claim it is insisted, on behalf of the United States—

1st. That this court has no jurisdiction of this claim. This court has jurisdiction to hear and determine all claims against the government founded on any law of Congress, regulation of an executive department, or any contract, express or implied. But it is insisted that this jurisdiction does not empower this court to inquire into, reverse and remit or refund to any person any fine or amercement imposed by any tribunal lawfully authorized to impose fines or amercements. The 312th, 313th, and 314th regulations of the Post Office Department impose fines on contractors in certain cases therein specified, which may be remitted by the Postmaster General if he judges the excuse sufficient; but if the delinquency of the contractor be ascertained, he stands fined, unless the Postmaster General is satisfied of the sufficiency of his excuse and remits the fine. It is respectfully insisted that this court has no jurisdiction to reverse the action of the Postmaster General, and adjudge an excuse deemed by him insufficient to be otherwise, and remit or refund to the party a fine imposed by the regulations. Even if the insertion of the substance of the regulations in the contract makes the fines for failures liquidated damages, yet that does not confer on this court power to release those damages. In such case the Postmaster General is the only officer of the government authorized to inquire into the circumstances, and mitigate or remit the fine.

2d. Congress has power to remit all or part of the fine, and by the act of August 4, 1854, remitted $750, more than half the fine, but in doing this has refused to remit the residue.

3d. If this court has jurisdiction to inquire into the justice of the fine, the facts proved would not authorize its remission.

Fifth. The petitioner claims one month's pay when his contracts were declared forfeited. Neither the regulations of the department nor the contracts sustain this claim.

DANIEL RATCLIFFE,
Ass't Sol'r of C. Claims.

J. C. BUCKLES *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petition states the following case:

In the years 1847, 1848, and 1849, the claimant contracted to transport the mail under three several contracts, numbered 5005, 5103, and 4077. Under the first contract, numbered 5005, he agreed to carry the mail between Louisville, Ky., and Shawneetown, Ill., by steamboat, a distance of 150 miles, three times a week, forwards and backwards, for the sum of $4,560 per annum, supplying seven post offices, all on the Kentucky side of the river. Subsequently, the Postmaster General directed the route to be extended to Paducah, in Ken-

tucky, a distance of 350 miles, and the mails to be delivered at fifteen additional offices, including several in Indiana. This additional service he performed for a period of six months before any formal contract for the same was made between the parties. For this he claims an additional compensation, estimated at a pro rata increase upon the terms of his prior contract. He afterwards agreed to carry the mail upon this additional route, No. 4077, for the sum of $3,000 per annum.

It appears from the letter of Mr. Dundas, of the 6th of February, 1857, that no contract was ever executed by the claimant for this route, No. 4077.

It appears from the papers in the case that whatever service the claimant performed during this period of six months was not done at the request of the department; and it is further apparent that the service was very irregularly performed. Under his contract for route 5005, the postmaster at Louisville was not authorized to require the claimant to supply the Indiana offices, and he was not bound to obey any such order. Even admitting that the service was regularly performed, he was informed by the department what compensation would be allowed, and he has no foundation for a claim upon a *quantum meruit*. This appears from the letter of the Postmaster General of the 11th December, 1847; and on the 8th of January 1848, he was informed that only the sum of $625 could be saved by discontinuing the land service in Indiana, should it be concluded to embrace in route 5005 the towns in that State, and that in no event could he be allowed more than that sum, and that the Postmaster General was not disposed to order the changes in the Indiana supplies requested by the claimant.

The case, therefore, does not stand upon the ground of services rendered with the knowledge of the department, and not objected to; but the case is that of services proposed to be rendered, and immediately objected to by the department. There seems to be no ground for asking payment for services in this state of the facts, whether they were subsequently performed or not.

The claimant states in his petition that "an arrangement was finally concluded, under the pressure of circumstances disclosed in the papers, by which the petitioner found himself compelled, under the apprehension of serious losses, to enter into the contract upon this additional route No. 4077 at the very reduced rate of $3,000 per annum." From this allegation the inference would seem to be, that the claimant was forced into this contract against his will; but we do not find in the papers any such "pressure of circumstances" as is here stated to have existed. The letter of Mr. Read, the postmaster at Louisville, dated January 18, 1849, states the reasons why he was induced to make the contract with the claimant for the service for which the compensation is sought; but his letter shows at the same time that there were great irregularities in the transmission of the mails, and he states that he despairs of any improvement, and that the experiment had been sufficiently tried, and had signally failed.

Upon the three routes before mentioned the petitioner claims that he is entitled to the sum of $406—the amount actually paid by him for carrying the mails to and from the steamboat and post offices,

where these mails were to be delivered, and from which other mails were to be received.

It appears from the letter of Mr. Hobbie, of the 11th December, 1847, that the claimant was informed that the department would pay him whatever net saving could be effected upon the land routes. Mr. Hobbie's letter concludes by saying, "the department would expect you to take the mails in each case to and from the post offices." The contract for route No. 5005 contains the following engagement on the part of the contractor:

"3. To take the mail and every part of it from, and deliver it and every part of it into, each post office on the route, or that may hereafter be established on the route, provided [it be] not more than one-quarter of a mile from the landing; and into the post offices at each end of the route, and to the mail carriers on connecting routes." The same provision is contained in the contract for route No. 5103.

We find no evidence that any of the post offices were more than a quarter of a mile from the landing, and we see no reason why this claim should be allowed.

The petitioner also alleges that the department, in adjusting his account under the contract for route No. 5103, has deducted the sum of $1,411 for fines and forfeitures for not delivering the mails regularly, and that whatever omissions occurred were occasioned by causes wholly beyond his or any other human control—by the low state of the water, fogs, ice, and other providential impediments. And he alleges that, for delinquences arising from such causes, it would be the height of injustice to make him responsible, or to mulct him in damages; and that this sum of $1,411 he is entitled to recover.

The 312th regulation of the Post Office Department provides that "in all cases there is to be a forfeiture of the pay of the trip when the trip is not run, and of not more than three times the pay of the trip when the trip is not run, and no sufficient excuse for the failure is furnished."

The 314th regulation provides that "fines will be imposed, unless the delinquency be satisfactorily explained in due time for failing to take from, or deliver at, a post office the mail, or any part of it."

The 315th regulation provides that "the Postmaster General may annul the contract for repeated failures."

These regulations are embodied in the contract for the route in question.

It is very evident that, by the regulations of the department, and the provisions of the contract, the Postmaster General has full power to determine whether a sufficient excuse for a failure is furnished. No appeal from his judgment is given to any tribunal; but it is provided by the 22d section of the act of July 2, 1836, (5 Statutes, 85,) that the Postmaster General shall make an annual report to Congress "of all fines imposed and deductions from the pay of contractors made during the preceding year for failures to deliver the mail, or for any other cause, stating the names of the delinquent contractors, the nature of the delinquency, the route on which it occurred, the time when the fine was imposed, and whether the fine has been remitted, or order for deduction rescinded, and for what reason."

In this way the whole subject of fines and forfeitures is brought to the consideration of Congress in an authentic manner, and Congress having the action of the Postmaster General before them, together with the reasons for his conduct, can at once determine whether injustice has been done, and take such action as each case may require.

The whole matter is thus, in the first instance, submitted to the discretion of the Postmaster General, and that discretion is, of course, to be a reasonable and legal discretion, and not a mere arbitrary exercise of power. He is to exercise his judgment upon the facts as they appear to him to exist. Now, it is a well settled principle of law, that when a matter is submitted to the discretion of any tribunal, and that tribunal exercises its discretion, its judgment cannot be set aside upon the ground that it had mistaken the merits of the question. In the present case, if we were to determine that this sum of $1,411 should be paid to the claimant, we should reverse the decision of the Postmaster General upon the merits of the question submitted to him—a revisory power which we do not think we possess.

Upon this subject it may be remarked, in addition, that in the report of the 3d of February, 1852, the following statement occurs: "The reason so assigned will, it is believed, satisfy the committee that the service was very indifferently performed, and that the deductions were properly made. In connexion, however, with this subject, copies of the reports of the postmasters on the route are herewith submitted, from which it will be seen that the service, as conducted by Mr. Buckles, conferred very little benefit on the community interested, and that the department has merely not paid him for services which he did not perform. Mr. Buckles is in error when he states that the deductions were made for his failing to arrive in schedule time. The reports of the postmasters above mentioned show that whole trips were omitted to be performed; and, furthermore, no intelligent postmaster would send a through mail by his boats when, as he admits in his memorial, two or three weeks were required to perform a trip."

For these reasons, and in this state of facts, we do not think that the claimant has any cause of action on the ground specified.

The last item of claim in the petition is as follows: The claimant alleges that "each of these contracts contained a stipulation that the Postmaster General reserves the right to discontinue any route at his discretion, but with the distinct provision that, in case of such discontinuance before the expiration of the time provided in the contract, it shall be done on the payment of one month's full pay to the contractor." He alleges that each of the aforesaid three routes being thus discontinued, he was entitled to receive one month's pay on each of them at the time the service ceased.

The 315th regulation provides that "the Postmaster General may annul the contract for repeated failures." It has been before stated that in the report of the Postmaster General the following sentence occurs: "The reports of postmasters above mentioned show that whole trips were omitted to be performed; and, furthermore, no intelligent postmaster would send a through mail by his boats when, as he admits in his memorial, two to three weeks were required to perform a trip." He says, also: "Mr. Buckles seems to have

forgotten entirely the circumstances under which his service was discontinued. He was at the department in December, 1850, and was informed that the service as performed by him, being an injury instead of a benefit to the community, the Postmaster General would be compelled to annul his contract. He requested that he might be allowed a further trial, with the assurance that the duties under his contract should be so discharged as to remove all cause of complaint. The Postmaster General allowed him another month, during which, there being no improvement in the service, the contract was annulled for *repeated failures*, and not from any influence of the agent."

The 315th regulation referred to contains no provision for a month's pay where a contract is annulled for repeated failures, nor is anything said in the contracts about a month's pay. The only allusion to that matter is found in the 317th regulation, which is as follows:

"The Postmaster General may annul the contract or discontinue or curtail the service and pay when he wishes to dispense with the service in whole or in part, or to place a higher or different grade of service on the route, or whenever the public interest requires such discontinuance or curtailment for any other cause, he allowing one month's extra pay on the amount of service dispensed with."

Now, it is very evident that when a contract is annulled for any of the causes stated in this regulation, no fault is necessarily to be imputed to the contractor, and the month's extra pay is given him by way of compensation for the loss he may have sustained by such annulment. The public interest may require the service to be dispensed with, without any fault on the part of the contractor. But the annulment of a contract for repeated failures is a very different matter. It would be singular, indeed, if, when a contract is annulled on account of the fault of the contractor, he should receive a month's extra pay to compensate him for the non-performance of his duty, and that such an inducement should be held out to him to violate his obligations.

We do not think, therefore, that he is entitled to receive a month's extra pay from the United States.

But the Solicitor makes a further answer to this claim. On the 5th April, 1854, the House Committee on the Post Office and Post Roads made a report, No. 129, (1st sess. 33d Cong.,) in which, after stating the claim of the petitioner, the committee recommended that the sum of $3,006 be paid him, which they distribute as follows:

For the six months' service	$1,500
For mail messenger service, &c	406
For deductions from his contract price	750
For mail messenger service of route 5103	350
Total	$3,006

For this sum the committee reported a bill, which became a law on the 5th of August, 1854, (10 Stat. 819.) Now, if the petitioner had a valid claim against the United States for the sum which he now seeks to recover, we should not undertake to say that the payment of a

part of it could be considered as an accord and satisfaction, or as a discharge of the whole. But he has received the whole amount of the money for the mail messenger service to which he sets up a claim in his petition; and that, of course, is a perfect answer to such part of his claim, even if there were no other. Of the $1,411, the amount of the fines, &c., he received $750; and of the sum of $3,040, the sum which in his argument he claimed to recover for the six months' service, he has received $1,500. He has, therefore, now no claim for the mail messenger money—1st, because the claim never was a valid one; and, 2d, because, whether valid or invalid, it has been paid. And of the other claims the partial payments are a discharge *pro tanto*.

In the opinion of the Court, he has no valid cause of action against the United States.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 60.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER, 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MICHEL MUSY AND ANDRÉ GALTIER, *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Claimants' brief.
3. Certified copies of papers from Treasury Department transmitted to the House of Representatives.
4. Depositions taken by the claimants and transmitted to the House of Representatives.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

MICHEL MUSY and ANDRÉ GALTIER, *vs.* THE UNITED STATES. } Petition.

To the honorable Court of Claims:

The petition of Michel Musy and André Galtier, composi firm of Musy & Galtier, of Lyons, France, and of the ci

York, respectfully represents, that the United States are indebted to your petitioners for money had and received, illegally exacted of your petitioners by the collectors of the customs duly authorized by the United States to act as such collector at the port of New York.

Your petitioners further show that they are manufacturers of silk velvets, serges, satin dechine, and other goods; that their manufacturing business is transacted at Lyons, in the empire of France; that, by careful personal attention and supervision, they have been enabled to manufacture and produce silk velvets of a superior finish, and particularly adapted to the market of New York.

Your petitioners further show that in the year 1849 they established a house in the city of New York, under the personal supervision of their partner, M. Musy, for the sale of their manufactures, and for the transaction of the business of importing merchants, and have continued the said business for about seven years.

Your petitioners further show, that their manufactures have been imported into the United States, and uniformly invoiced, and entered at the collector's office, at New York, at the fair market value of such imports at Lyons, as of the date when the said imports were made ready for shipment from Lyons for the port of New York. And in order properly to specify in their invoices the fair market value of their manufactures, with reference to the duties to be paid on entry of the same, your petitioners have ascertained the actual value of the materials made use of, and expenses of manufacturing the same into the articles imported; and to the aggregate cost of manufacturing the articles your petitioners have added the usual manufacturers' profit of the manufactures of like articles, being about six per cent.—all which costs and profits are equal to the value specified in their invoices, severally; at which value your petitioners were ready and willing to have sold the said articles at Lyons. Such is the value upon which your petitioners base their prices and sales in New York; and such value, ascertained and estimated as aforesaid, your petitioners have reason to believe, and do believe, was the true fair market value of the said articles at Lyons, and the true dutiable value of the same when imported and entered by your petitioners at the port of New York.

Your petitioners further show, that their imports entered for duty at the port of New York within the past seven years, with but few exceptions, on examination by the public appraisers and their assistants, have been found to have been invoiced at their fair market value at Lyons, and were so reported by said appraisers to the collector of the customs, and your said petitioners have paid the duties upon such value.

Your petitioners further say that, being both manufacturers and dealers in silk goods of their own manufacture at Lyons, they do know, more certainly than any other person or persons can know, the quality, texture, value, and fair market price of the articles manufactured by them, and also the price or value for which they are ready and willing to sell the same, and do sell their manufactures for at Lyons; and notwithstanding your petitioners have honestly and truly invoiced and entered their imports for duty at the fair market value

of the same, as of the time of the consignment and shipment, from Lyons, of said imports; and notwithstanding the public appraisers and their assistants have honestly endeavored to ascertain and estimate the fair market value, and the dutiable value of the same, still it has happened that such assistants have overestimated the fair market value in the market at Lyons, (which is one of the principal markets for silk goods in France,) by reason whereof your petitioners have been required to pay more duties upon their imports than were by law imposed on the same.

Your petitioners further show, that on certain imports by them entered for duty, at New York, the collector of the customs exacted a duty of 25 per cent. upon the valuation of the same by the public appraisers or their assistants, whereby he collected an excess of duty; and, in addition thereto, he exacted a penalty of 20 per cent. upon said imports upon such valuation, and claimed authority therefor under the tariff act of July 30, 1846, section 8; which excess of duty and penalty said collector was not authorized to exact of your petitioners, because the imports on which the said excess of duty and penalty was exacted were entered at their fair market value by your petitioners; and because the said imports had not been purchased by your petitioners, but had been actually manufactured by them, and imported by their firm into the port of New York; and because it was well known by the collector of customs, the assistant collector, Odell, and the public appraisers and their assistants, that your petitioners were the manufacturers of the said imports.

And your petitioners further show, that the money exacted by the collector of the customs, in excess of the legal duty and penalties upon the manufactures of your petitioners, amounted to $1,755 25, as will appear by reference to a statement of the same hereunto annexed, and to the invoices and entries of your petitioners, of record in the collector's office at New York, all which sums of money your petitioners were required to pay, and did pay, to the collector of customs, in order to obtain possession of their said imports; and on payment of the same your petitioners remonstrated and protested in writing; and the several sums of money so paid, as aforesaid, your petitioners have reason to believe, and do believe, have been accounted for in the accounts of the customs, and by the collector of the customs paid over to the United States.

Your petitioners further say that, by section 1, schedule D, of the tariff act of July 30, 1846, (9 Statutes at Large, 42,) a duty of 25 per cent. was imposed upon your petitioners' imports, the same being manufactures of silk, or of which silk was a component material; and that by the act of March 1, 1823, (sec. 5, 3 Statutes at Large, 732,) such duty should have been estimated upon the fair market value of said goods at Lyons at the time the same were manufactured and made ready for shipment to the United States, as specified in the invoices and entries of the same on file in the office of the collector of the customs.

Your petitioners further say that, in preparing their entries and making entry of their imports at the collector's office, your petitioners, as is the usual practice at the port of New York, employed a custom-

house broker, an able expert in custom-house business, and conformed in all things to the usage at the collector's office, and to the directions of the assistant and deputy collectors, in entering their imports for duty; and the assistant collector and deputy collectors, knowing your petitioners to be the manufacturers, as well as the owners, of the imports described in the entries, administered to your petitioner, Mr. Musy, the oath usually denominated the "owner's oath," instead of the oath provided by law to have been administered by the collector, his assistant, or deputy, viz., the oath denominated "manufacturer's or owner's oath, in cases where goods, wares, or merchandise have not been actually purchased;" and your petitioners further say that they have not known the latter oath to be administered at the collector's office in New York, and they are informed and believe such oath has not been in general use in the collector's office in New York for more than seven years past; your petitioners further say that on one occasion, in July, 1853, they requested the assistant collector, Odell, to allow him to make an entry anew, and be re-sworn, and to use the latter oath; but the said assistant collector refused to allow your petitioners to correct their entry, and be so sworn.

Wherefore, your petitioners, relying upon the justice of their cause and the statutes made and provided, humbly pray this honorable court to take your petitioners' case into consideration, and grant to them such a judgment, and other relief, as, in the judgment of this honorable court, they may be legally entitled to, in order that the money illegally exacted, as aforesaid, may be refunded to your petitioners, together with interest, and their costs and expenses, incurred in the prosecution of this suit; and, as in duty bound, will ever pray.

MUSY & GALTIER.

NEW YORK, *April* 26, 1856.

SOUTHERN DISTRICT OF NEW YORK, }
City and county of New York, } *ss.*

Michel Musy, of the firm of Musy & Galtier, being sworn, says that he has read the foregoing, and the facts stated in the petition are true, to the best of his knowledge and belief.

M. MUSY.

Sworn to before me, this 1st day of April, 1856.

R. E. STILLWELL,
United States Commissioner.

CHARLES E. SHERMAN,
JOHN ELY,
Attorneys for Petitioners.

Statement of an excess of duty and penalty exacted on manufactures of silk belonging to the manufacturers, Musy & Galtier, and imported by them into the port of New York.

When imported.	Name of vessel.	Where from.	Articles imported.	Value per—		Increase in value.	Rate of duty and penalty.	Duty and penalty claimed.
				Invoice.	By collector.			
1849.								
July	Niobe	Havre	Silk velvets	$2,948	$3,532	584	25	$146 00
			penalty on		3,532		20	706 40
August	St. Dennis	Do	Silk velvets	3,064	3,181	117	25	29 25
			penalty on		731		20	146 20
1853.								
July	Africa	Liverpool	Silk velvets				25	
			penalty on		670		20	134 00
August	Str. Humboldt	Havre	Silk velvets		3,967		25	
			penalty on		2,967		20	593 40
	E. and C. excepted, amount claimed							1,755 25

With interest on the same from time of payment.

MUSY & GALTIER.

NEW YORK, *April* 26, 1856.

COURT OF CLAIMS.

MICHEL MUSY and ANDRÉ GALTIER,
vs.
THE UNITED STATES.
No. 583.

Brief of legal points and authorities, under Rule XX.

The facts in this case are set forth in the petition and the evidence.

The acts of Congress which govern in this case are the acts of—

1823, March 1.—(3 Stat. at Large, 792, secs. 4 and 5.)

1846, July 30.—(9 Stat. at Large, 42, sec. 1, sched. D.)

The act of March 1, 1823, provides generally for the entry of imports and the collection of the duties.

Sec. 4th provides for an entry of imports, by or according to the invoice.

Sec. 5th provides for estimating the duties upon imports upon the actual cost of the same if purchased, and upon the actual value of the same if procured otherwise than by purchase.

By the tariff act of July 30, 1846, sec. 1, sched. D, a duty of 25 per cent. was imposed upon "manufactures of silk," the goods referred to in the petition.

The collector admitted the imports to entry upon the invoice value, under the act of March 1, 1823, sec. 4, and he should have estimated the duties, as required by sec. 5, at 25 per cent. upon the value declared on the entries of said imports.

First. In behalf of the petitioners, it will be contended that the collector erred in that, without authority of law, sets aside the value declared on the entries of the imports, and substituted another and an increased value whereon to estimate the duties.

Second. It will also be contended that, in August, 1849, Messrs. Edgar, Pomeroy & Savage assumed to act as public appraisers, and in July and August, 1853, Messrs. Willis, Philips & Savage assumed to act as public appraisers at the port of New York, neither of whom were lawfully qualified and authorized to act as public appraisers, in the manner required by the act of March 1, 1823, sec. 16, or by any other act; and that their acts were void, for want of authority in them to act as public appraisers.

Third. As to the imports entered in August, 1849, the estimate of value, made by Mr. Nichols, an examining clerk, in the office of the public appraisers, it is not such an appraisement as the statute authorized and required.

An appraisement should be made by two appraisers, duly qualified by the act of March 1, 1823, sec. 16.

Fourth. As to the imports entered by the Africa in July, 1853, the pretended appraisement, by Messrs. Gourd & Emery, is a nullity. They were not sworn, as the statute required.—(Act of 1st March, 1823, sec. 16.) One of them, Mr. Gourd, was attempted to be qualified by an oath unauthorized by law and in violation of law.—

(See act of March 1, 1823, secs. 18 and 16.) The other, Mr. Emery, does not appear to have been sworn at all.

Fifth. As to imports entered in August, 1853, per steamer Humboldt, there is no evidence of any appraisement by any appraiser duly qualified.

Jacob's Law Dictionary, title "*Oath*," page 425. In Day *vs.* Wilbur, 2d Caine's Reports, p. 134, the judges all agreed that if the oath administered *varied* from the form prescribed by the act, *it was void.*

It will also be contended, in behalf of the petitioners that, the general authority to appraise imports which have been entered by invoice is found in the act of 1823, secs. 13 and 16, viz:

"Whenever, in the opinion of the collector, there shall be just grounds to suspect that goods * * have been invoiced below their true value, * * &c., such collector shall direct the same to be appraised in the manner prescribed by this act."

In addition to this general provision, a *special provision* is made for an appraisement, upon the happening of a *certain contingency*, by section 8, of the act of July 30, 1846.

1st. The imports must have been "*actually purchased.*"—(See Thompson *vs.* Greely, 10 *Howard*, 235.)

2d. An addition by the importer must be made on the entry to the cost or value given in the invoice.

3d. The dutiable value of *such imports* must be "appraised, estimated and ascertained, in *accordance with existing laws*"—laws existing July 30, 1846.

4th. The appraised value of *such imports* must exceed by ten per cent. or more "*the value so declared on the entry*," or the additional or penal duty of 20 per cent. is not incurred.

Unless the goods have been "*actually purchased*," and "the value so declared on the entry," viz., by an addition to the "*cost or value given in the invoice*," this act does not apply, and such imports come under the general provisions of the act of 1823, above cited.

It will be further contended that the collector erred in that he exacted an additional or penal duty upon the imports referred to in the petition.

I. The penalty imposed by the 8th section of the act of 1846 does not apply to this case, because—

1st. In the case before us the imports were not actually purchased, and no such addition was made.

2d. That act requires an appraisement "in accordance with existing laws"—laws existing July 30, 1846, which laws required that appraisers should be qualified by taking a certain oath. No appraisement was made by persons duly qualified.

II. The laws existing July 30, 1846, required an appraisement of the value *as of the time and place when and where purchased.* Such was also the dutiable value of imports. The act of March 3, 1851, 9 *Stat. at Large*, 629, introduced a new rule of appraisement and a new basis of value whereon to assess the duty, without any penalty or extra duty.

Section 1 requires the duties to be estimated upon the actual market

value in the principal markets *at the time of exportation to the United States.*

Section 4 of the same act repeals all acts and parts of acts inconsistent with the provisions of that act, including, of course, the penal or additional duties.

III. The imports entered in July, 1853, were subject to duty, under the act of 1851, upon such value as the appraisers should report, as of the time of the exportation to the United States.

IV. The imports entered in August, 1853, were not liable to a penalty under the 16th and 17th sections of the act of 1842, (5 *Stat. at Large*, 565,) because section 16th applies only to imports that have been purchased; and the additional or penal duty of 50 per centum, imposed by section 17th, was imposed only upon imports appraised in the manner specially set forth in that section "*on the same goods,*" the value of which has been appraised "*as hereinbefore stated,*" and on none other.

V. The duties imposed by sections 1, 3 and 8 of the tariff act of 1846, are by that act declared to be "in lieu of the duties heretofore imposed by law." And section 11th of that act repeals all acts and parts of acts repugnant to the provisions of that act.

The additional duty provided for by the 17th section of the act of 1842 was, by the act of 1846, repealed.

"Where the appraisement, as in this case, is sought to be made the ground for a large penalty, the statute must be adhered to strictly." So said Woodbury, J., in the case of Thompson & Forman *vs.* Greely.

"Especially in a penal provision, it could not seem judicious to extend it beyond the clear language of the act."—(Maxwell *vs.* Griswold, 10 *Howard*, 242.)

"A penal law shall not be extended by construction. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and the letter of the statute imposing the penalty."—(*Dwarris on Statutes*, 9 *Law Library*, 69.)

VI. The extra duty and penal duty exacted in this case, being in the treasury of the United States, without authority of law, and in violation of law, ought to be refunded.—(James Beatty's Executors *vs.* The United States, *Devereux's Reports*, 231; Sturgess, Bennett & Co. *vs.* The United States, *Ibid*, 244.)

IN THE COURT OF CLAIMS.

MICHEL MUSY AND ANDRÉ GALTIER *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioners, in the month of August, A. D. 1849, and in the months of July and August, A. D. 1853, made four several importations of silk velvets from the city of Lyons, in France, into the port of New York. In each instance, the appraised value of the goods having exceeded the value declared on the entry by more than ten

per centum, the collector, "in addition to the duties imposed by law" on the same, caused to "be levied, collected, and paid, a duty of twenty *per centum ad valorem* on such appraised value," under the 8th section of the tariff act of 1846.

The petitioners allege that they were the manufacturers, and not the actual purchasers of the goods, and that they entered them at their fair market value in the city of Lyons at the time of their exportation. They, therefore, claim that the duties imposed on the excess of the appraised value over the value declared on the entry and the additional duties on the appraised value were illegally exacted. Such duties and additional duties amounted to the sum of $1,831 05, and the petitioners now ask the repayment thereof to them.

The importations of August, A. D. 1849, were made in the ships Niobe and St. Denis, and those of July and August, A. D. 1853, in the ship Africa and steamer Humboldt. On each entry the petitioner, Musy, took the oath prescribed by the fourth section of the act of March 1, A. D. 1823, as the "owner's oath in cases where goods, wares, or merchandise have been actually purchased."—(3 Stat. at Large, p. 731.) The proof of this is full and complete as to three of the entries, and it is plainly inferable from the petition as to the remaining entry. It is alleged in the petition that in July, A. D. 1853, the petitioners required the assistant collector to allow the petitioner, Musy, to make a new entry, and to take the "manufacturer's or owner's oath in cases where goods, wares, or merchandise have not been actually purchased;" but he was not permitted to do so. There is no proof of this allegation, and it does not appear, from the evidence, that any objection was made to the taking of the "owner's oath," either before or after it was taken, at the custom-house or in the presence of any of the custom-house officers. Nor does it appear, from the evidence, that the petitioners ever pretended to those officers, or any of them, that they were the manufacturers, and not the actual purchasers of the goods. Under such circumstances, it seems to us that they must be concluded as to this fact, and that they cannot now be admitted or received to contradict by parol evidence their own statements made on each entry under oath. We, therefore, must regard them as the actual purchasers, and not the manufacturers of the goods in question.

The petitioners do not pretend that there was any difference between the value of the goods at the time of their procurement and the value of them at the time of their exportation. On the contrary, they expressly allege that they "honestly and truly invoiced and entered their imports for duty at the fair market value of the same, as of the time of the consignment and shipment from Lyons." The periods of purchase or procurement and exportation were, therefore, identical; and in ascertaining the value of the goods at the time of exportation, the appraisers necessarily ascertained their value at the time of procurement or purchase. It was the duty of the appraisers to have ascertained the value of the goods imported in 1849 at the time of their purchase or procurement, and of those imported in 1853 at the time of their exportation.—(Maxwell *vs.* Griswold, 10 How. R., 242; Greely *vs.* Thompson, ibid, 225; 9 Stat. at Large, pp. 628–629.) The

appraisements, therefore, were legally made, and, consequently, are conclusive as to the dutiable value of the goods.—(Bartlett *vs.* Kane, 16 How. R., 263.)

In contemplation of law, the petitioners' case is simply this: they purchased goods in the city of Lyons, whence they imported them into the port of New York. The collector caused the dutiable value of the goods to be appraised, in accordance with the provisions of existing laws, and the appraised value thereof exceeding by more than ten *per centum* the value declared on the entry, he, in addition to the duties imposed by law on the same, required to be levied, collected, and paid a duty of twenty *per centum ad valorem* on the appraised value. The petitioners cannot complain that they are treated as purchasers, inasmuch as they so declared themselves, on oath, at the time of each entry. If they are now permitted to contradict their own statement thus solemnly made, it would establish a principle which, however justly it might operate in this particular case, would open a door for the introduction of incalculable frauds on the public treasury. We have already expressed our opinion as to the construction of the act of 1851, (3 Stat. at Large, pp. 629–30,) in the case of Dow and Ditmas *vs.* The United States, recently decided by this Court.—(See, also, Stairs *vs.* Peaslee, 18 How. R., 521.) Such being the petitioners' case, there can be no doubt, we think, that the action of the collector was lawful and right.

We are of the opinion that the petitioners are not entitled to relief.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 61.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HENRY MILLER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. United States Solicitor's brief.
4. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

HENRY MILLER, *vs.* THE UNITED STATES, } Claim—petition.

To the honorable Judges of the Court of Claims of the United States at Washington, D. C., in the District of Columbia:

Your petitioner, Henry Miller, of the county of Rockcastle, in the State of Kentucky, in his humble capacity, would respectfully represent to this honorable court:

That he entered in the service of the United States from the county of Bledsoe, in the State of Tennessee, in the year 1812 or 1813, in the fall of the year, for the term of eighteen months, under Captain Anderson, was then transferred to Captain Armstrong, then to Captain

Butler, then to Captain Aplin, then to Captain Hamilton, rifle, in the United States regiment of infantry, commanded by Colonel Gaines, in the war declared by the United States against Great Britain, on the 18th day of June, 1812, which time I served out faithfully; and in the month of February, 1814, while I was engaged strictly in the line of my duty as a soldier in the military service of the United States, building breast works at Lower Sandusky, my foot and ankle was mashed by the fall of a log, from which it inflamed and grew worse until the month of August, 1827, when my leg was amputated from my body in consequence of said wound. And in the year 1851 or 1852, I filed my petition from the county of Rockcastle, in the State of Kentucky, to the Pension Office at Washington, D. C., for the benefit of the pension act of Congress, approved 16th of April, 1816, or the pension laws of the United States made and provided for in such cases, upon which a pension was awarded to me under the law of the United States of $8 per month, commencing on the 14th day of April, in the year 1852, the day on which the last proof in the case was completed, and after said pension was awarded to me, I am advised an appeal was taken, by my attorney, to the honorable Secretary of the Interior, and claimed that justice demanded, and the laws of Congress gave to me an increased pension, at $8 per month, to commence the month of August, 1817, the time when the amputation took place, and the opinion of the honorable Commissioner of Pensions was confirmed by the then Secretary of the Interior, and said my only redress was to Congress. And afterwards a petition, with 250 subscribers of the names of the best citizens of my county in the State of Kentucky, was presented to Congress for my benefit, asking that honorable body to pass a law for my benefit, for the back pay claimed, at $8 per month, to take date at the time when the amputation was made. Also a separate petition for increase of pension was presented to Congress, both of which I am informed was referred to a Committee on Invalid Pensions, and was by that committee rejected; and now files this petition before this honorable Court for redress. And to sustain my claim to the increase of pension, at $96 per annum, claim, as aforesaid, under the act of Congress of 16th April, 1816.

This honorable Court of Claims is respectfully referred to the aforesaid act of 16th April, 1816, &c., and to all the papers on file in the Pension Office at Washington, D. C., or is on file in any department or office of government, upon which I was granted a pension, and to both petitions in Congress, as aforesaid, to show the justness of my claim, is respectfully submitted.

HENRY MILLER.

STATE OF KENTUCKY, }
County of Rockcastle. }

I, J. E. Carson, the presiding judge of the county court, in and for said county, do hereby certify that Henry Miller personally appeared before me on the 27th day of November, in the year 1855, and made oath to his foregoing petition according to law; that the contents

thereof was true, and signed the same in my presence with his own hand, and I have no interest in this claim or concerned in its prosecution.

J. E. CARSON, *Judge.*

STATE OF KENTUCKY, }
County of Rockcastle. }

I, E. T. Fish, clerk of the county court, in and for said county, do hereby certify that John E. Carson, judge, before whom the foregoing affidavit and petition was sworn to, was at its date the presiding judge of the county court, in and for said county, duly commissioned and sworn according to law, and his signature thereto is genuine.

In testimony whereof, I have hereunto signed my name and affixed the seal of said county court, on the 28th day of November, 1855. [L. S.]

E. T. FISH, *Clerk, C. C.*

HENRY MILLER
vs. } Claim. Brief.
THE UNITED STATES.

Your petitioner, Henry Miller, of the county of Rockcastle, in the State of Kentucky, would respectfully state in my humble capacity by way of a brief—

That the petition I have filed before this honorable Court represents that I am an invalid pensioner of the United States, at $8 per month, under the law of the United States, or act of Congress of 16th of April, 1816, commencing on the 14th day of April, in the year 1852, on account of disability incurred while in the line of my duty as a soldier in the military service of the United States, in the war declared by the United States against Great Britain on the 18th day of June, 1812.

The honorable Commissioner of Pensions, in his deliberation, thought proper to decide in my case that the invalid pensioners' laws did not authorize him to award to me my pension to take date at the time the amputation was made in August, 1817, as claimed by my attorney; that the rules of the department only granted invalid pensioners to take date on the day the completion of the last proof was made in my claim, and was in accordance to me awarded.

My attorney believing under the law I was entitled to my pension at $8 per month, to take date the month of August, 1817, the time when my leg was amputated, an appeal was taken to the honorable Secretary of the Interior for redress, and the honorable Commissioner of Pensions opinion was confirmed by the said Secretary, and said my remedy was to Congress.

I filed a petition to that honorable body, with the names of 250 of the best citizens of my county thereto subscribed, asking Congress to award to me the back pay, claimed as aforesaid; also a petition was presented for increase of pension, and referred to a Committee on Invalid Pensions, and was by them rejected; and all the papers mentioned in the petition before the honorable Court is referred to, to show

the justness of my claim. After a full examination of the pension act of 16th April, 1816, and all the pension laws, under which was awarded to me by the United States a pension, is referred to, to sustain my claim; in particular the act of April, 1816; that says not a word as to time such pensions shall commence; consequently I am clearly of the opinion, under the law aforesaid, with a liberal construction of the same, that I am entitled to the increase pension claimed, at $8 per month, to commence the month of August, 1817, the time when the amputation was made, and this honorable Court will doubtless so decide.

It may be said, why did I not sooner apply for my pension; to which I can readily reply, that in my youthful days I lived in the State of Tennessee, in a desolate, thinly populated country, where the name of a pension, as to my rights to it, never reached me. In my helpless condition, but little mixing with the people had fallen to my share; consequently I knew nothing of my rights to a pension; but when I moved to Kentucky, some three years previous to my application was made, I learned that the United States was indebted to me a pension, is the cause of the delay. I feel sanguine that this honorable Court, in its deliberation upon the circumstances of my claim, and the law under which I am a pensioner, will decree for me that the law aforesaid embraces my claim, and will award to me the arrears of pension claimed, at $8 per month, from the month of August, 1817, the time the amputation was made. That memorable month I shall never forget, and will decide as did the honorable Secrtary Marcy, upon a case in point to mine. On the 28th of August, 1845, he said, "the practice of the department to commence the increase of an invalid pension on the day when the proof is made of an increase of disability is very proper, and is in conformity with the principles laid down in the invalid pension laws; and the reason of the law is that it is in all cases that the claimant will perfect his proof as soon as his disability is so increased as to render it proper to ask for an augmentation of his stipend, but in case where the pensioner has suffered an amputation of a limb from a wound received in battle, and delayed his application, after being pensioned, it is only just and entirely consistent with the humane policy of the laws and a liberal construction of the same, that he should receive his pension at the increased rates from the time when the amputation took place. Let this be the rule in future in every where a pensioner has suffered the amputation or loss of a limb, on account of a wound while in the line of his duty as a soldier receive the benefit of his increase pension from the time when the amputation was made."

I would here respectfully state to the honorable Court who will soon decide upon the destiny of my claim, that when but a youth I bowed to the call of my country, and went into its service to vindicate its rights by fighting its battles; in whose service I received a wound, as alleged in the petition, in consequence of which I have grown old in poverty, and now unable to support my family, composed of a wife and some helpless children, dependent upon me for support, and the pittance awarded to me of $8 per month. The pension is entirely inadequate for their support, and I flatter myself that justice will be due me by this honorable Court. That my better days are now passed

no more to return; it is thus I obey the laws of my country, because they are the laws of virtue; in their authority we see not the array of forces and terror, but the venerable image of our country's honor. Every good citizen makes that honor his own, and cherishes it not only as precious but as sacred; he is willing to risk his life in its defence, and is conscious that he gains protection while he gives it.

I have been too tedious in my humble way. I have but few more words to say; my case now being in your hands I am content whatever your judgment may be, and with pleasure will acquiesce.

My better days are past and gone, in poverty, caused from being in the service of my country, of which service I am proud to speak. I will shortly be laid in my silent grave; my lamp of life is nearly extinguished; my race is run; the grave will shortly open to receive me, and I sink into its bosom, and wait not for my helpless children who fondle about me, who look to me for support. It would be better for me to see my last days come, when my career shall have ended.

My claim is submitted to this honorable Court to dispose of as may be thought best, to which I will cheerfully submit, knowing that justice will be done.

HENRY MILLER.

IN THE COURT OF CLAIMS.—No. 458.

HENRY MILLER *vs.* THE UNITED STATES.

Brief of United States Solicitor.

The petitioner alleges, that he is an invalid pensioner under the act of April 16, 1816, and that the pension which he receives was made to commence April 14, 1852, the date when his proof of disability was completed; whereas he claims, that on completing his proof, he became entitled to arrears from August, 1817, the date when the disability he now labors under was incurred.

He refers in general terms to "all the pension laws," but sets forth no facts which would bring his case within any other act than the one specifically cited as being that under which he was pensioned; and that only need, therefore, be considered in this argument.

I. *The act cited contains no promise that the pension shall commence from the date of the disability.*

In the first section of the act of April 16, 1816, (3 Stat. 285,) is found a proviso directing that the officers and soldiers of the militia, embraced by that section, who have been disabled by wounds and otherwise, &c., &c., "shall be placed on the list of pensioners, in the same manner as the officers and soldiers of the regular army, under such forms of evidence as the President of the United States may prescribe."

This court has held in the case of Jane Smith *vs.* The United States, that the words, "in the same manner," applied to pensions, determine the commencement of the pension. We have then only to inquire when the pension of this claimant would have commenced, had he been a soldier of the regular army, and completed his proof of disability on the 14th of April, 1852.

When the act of April 16, 1816, was passed, soldiers in the army were pensioned under the 14th section of the act of March 16, 1802, (2 Stat. 132,) providing that disabled soldiers "be placed on the list of invalids of the United States, at such rate of pay and under such regulations as may be directed by the President of the United States for the time being." This section merely repeated the provision which had been made in all previous acts for raising troops, and was itself re-enacted by the 7th section of the act of March 3, 1815, (3 Stat. 224.) It is still in force.

In an opinion given under date of May 31, 1832, Attorney General Taney held, that under the power given by this section, the President might make such regulations as would exclude an invalid from the pension list, and thereby prevent him from receiving any pension whatever: *à fortiori*, he might make such regulations as would prevent him from receiving any pension prior to a given date.

The act of 1816, in connexion with that of 1802, gave the claimant a right to a benefit, to be ascertained by regulations prescribed by the President, which were to show the rate of the periodical payments, and the time when such payments should commence. It is then for the claimant to set forth the regulations which entitle him to the sum he claims. I am not informed of any regulation which would entitle him to an earlier commencement of the pension than that fixed by the department. On the contrary, the earliest known regulation on the subject, that of December, 1822, printed in Mayo and Moulton's book, p. 475, shows that the existing practice then was to grant pensions only from the date of completing proof. As early as the 21st of February, 1795, Congress, by act of that date, (1 Stat. 418,) limited the commencement of revolutionary invalid pensions to the time of completing the proof. And, although the commencement of other military pensions was left to be determined by the President, there is no reason to believe a different rule was intended to be applied to them. Revolutionary soldiers, equally with those of subsequent establishments, had been promised pensions for disabilities; and, if it be a breach of contract to defer the commencement of the pension beyond the date of the wound, then the act of February 21, 1795, violates the contract made by the resolution of August 26, 1776.

But in fact there is not in the act of 1816 any promise of payment to commence on the occurrence of disability. The promise is, that the disabled soldier "shall be placed on the list of pensioners." Pensioners are persons entitled to receive periodical payments for their daily support. Under the system long established in other countries for their army and navy, and early adopted in our own for our navy, (act of March 2, 1799,) and more recently for our army, (act of March 3, 1851,) invalids are entitled, upon application, and proving their claims, to be received into hospitals or asylums, where they are furnished with clothing, food, pocket-money, &c. But it has never been supposed that an invalid, upon being so received, is entitled to compensation for the food or clothing, or pocket-money, which he might have drawn had he applied at an earlier date; and with no more reason can the arrears in this case be contended for.

II. *An earlier commencement than that already granted is forbidden by law.*

The foregoing remarks apply to the ground suggested in argument, that the claimant had a vested right to a pension on the occurrence of the disability; and that *payment only* was deferred until the disability was shown to the department, and application was made for the pension. But before such proof was made, and while the claimant had not yet complied with the regulations on which his right to payment depended, Congress passed the act of May 15, 1820, (3 Stat., 596,) the 2d section of which declares "that the right any person now has, or may hereafter acquire, to receive a pension in virtue of any law of the United States, be considered to commence at the time of completing his testimony, pursuant to the act hereby revived and continued in force." The act revived was that of April 10, 1806, making provision for revolutionary invalids. Up to the 15th of May, 1820, the *provisions of law* limiting the commencement of pensions to the time of completing the proof, applied only to revolutionary invalids; the power to limit it in other cases was confided to the President, as above mentioned. By the act of May 16, 1820, the same limit was by law imposed upon all invalid pensions.

JNO. D. McPHERSON,
Deputy Solicitor.

HENRY MILLER *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petitioner alleges that in the fall of the year 1812–'13, he enlisted, for the term of 18 months, "under Captain Anderson; was then transferred to Captain Armstrong, then to Captain Butler, then to Captain Aplin, then to Captain Hamilton, rifle, in the United States regiment of infantry, commanded by Colonel Gaines," in the war against Great Britain; that in the month of February, 1814, while he was engaged strictly in the line of his duty as a soldier in the military service of the United States, building breastworks at Lower Sandusky, his foot and ankle were injured by the fall of a log, and that in the month of August, 1817, in consequence of this wound, his leg was amputated; that in the year 1851 or 1852, he applied to the Pension Office for the benefit of the pension act approved April 16, 1816, or the pension laws of the United States, and a pension of $8 per month was awarded to him, commencing on the 14th day of April, 1852, the day on which the last proof in the case was completed. From this decision he appealed to the Secretary of the Interior, claiming that his pension should commence in the month of August, 1817, the time when the amputation took place; but the opinion of the Commissioner was sustained by the Secretary.

The claim of the petitioner is very imperfectly stated, because if his pension does not commence at the time of the completion of his proof, it should commence in the month of February, 1814, the time when the disability was incurred, and not from the month of August, 1817, the time when his leg was amputated.

It does not very distinctly appear whether the claimant was a soldier in the militia or in the regular army, although we infer that at the time of his wound he was a soldier in Colonel Gaines' regiment. It is not, however, very material, as, in either case, his rights depend upon the same law. It is provided by the first section of the act of April 16, 1816, (3 Stat., 286,) "that the officers and private soldiers of the militia, as aforesaid, who have been disabled by wounds, or otherwise, while in the service of the United States, in the discharge of their duty, during the late war, shall be placed on the list of pensioners, in the same manner as the officers and soldiers of the regular army, under such forms of evidence as the President of the United States may prescribe."

By the 14th section of the act of January 11, 1812, (2 Stat., 673,) it is enacted, "that if any officer, non-commissioned officer, musician, or private, shall be disabled by wounds, or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pension and under such regulations as are or may be directed by law.

The 14th section of the act of March 16, 1802, (2 Stat., 135,) enacts "that if any officer, non-commissioned officer, musician or private, in the corps composing the peace establishment, shall be disabled by wounds or otherwise, while in the line of his duty, in public service, he shall be placed on the list of invalids of the United States at such rate of pay and under such regulations as may be directed by the President of the United States for the time being."

We have referred to the act of 1802, because the act of 1812 does not prescribe the manner in which the rate is to be fixed, nor the particular regulation under which the invalid should be placed on the roll of pensioners. The only act of Congress in force in 1812, to which the act of 1812 can be supposed to refer, is the act of 1802. As no subsequent law has provided different regulations, the act of 1802 must govern in all cases which arise under the act of 1812.—(See opinion of Attorney General Taney, 2 Op. Attorneys General, 519.)

On the 10th day of April, 1806, (2 Stat., 376,) an act was passed "to provide for persons who were disabled by known wounds received in the revolutionary war." The 4th section of this act provided "that every pension, or increase thereof by virtue of this act, shall commence on the day when the claimant shall have completed his testimony before the authority proper to take the same."

The act of May 15, 1820, (3 Stat., 596,) revives and continues in force the act of 1806 until the 15th of May, 1821. The 2d section of the act of 1820 provides "that the right any person now has or may hereafter acquire to receive a pension in virtue of any law of the United States, be considered to commence at the time of completing his testimony, pursuant to the act hereby revived and continued in force."

It thus appears that the provision relating to the time of the commencement of the pension contained in the act of 1806 was made applicable to all pensions, and that in all cases the pension was to commence at the time of completing the testimony. The same provision in relation to the time of the commencement of the pension is made by

the 2d section of the act of February 4, 1822, (3 Stat., 650.) On the 11th December, 1822, the following letter was written to Mr. Calhoun, the Secretary of War, by Mr. Edwards, the Commissioner of Pensions:

"WAR DEPARTMENT,
"*Pension Office, December* 11, 1822.

"SIR: In answer to the inquiry as to what has been the practice in cases of invalid pensioners placed on the list by special acts of Congress, as to the time of commencing the pensions, I have to state that the pension has been made to commence (so far as I have been able to ascertain by a reference to the files) at the date of the last deposition made in support of the claim The 4th section of the act of the 10th of April, 1806, requires the pension to commence on the day when the claimant shall have completed his testimony before the authority proper to take the same. The 2d section of the act of the 4th of February last declares that the pension shall commence at the time of completing the testimony pursuant to the act thereby revived.

"J. L. EDWARDS."

On this the Secretary made the following endorsement:

"WAR OFFICE, *December* 11, 1822.

"In pension applications hereafter the rule adopted by Congress within alluded to will be adhered to.

"J. C. CALHOUN."

At the time the claimant applied for his pension, in the year 1852, there were two acts of Congress in force providing that invalid pensions should commence from the time of the completion of the proof. There was also a regulation of the War Department, which must be considered as the act of the President, to the same effect. We can, therefore, come to no other conclusion than that the petitioner, however equitable a claim he may have upon Congress, has no legal cause of action against the United States for the amount of his pension from the time when the disability was incurred until the year 1852.

It may be remarked that the opinion of Mr. Secretary Marcy, of August 28, 1846, to which the claimant refers in his brief, is not applicable to the present case. Mr. Marcy says, that where it is very obvious that the pensioner has suffered the amputation of a limb from a wound received in battle, and has, by reason of his helpless condition, arising from the loss of his limb, delayed his application, he should receive his *increased* pension from the time when the amputation took place; but in this case the application is not for an increase of pension, but for the arrears of the present pension prior to 1852; secondly, the wound was not received in battle; thirdly, the claimant has not delayed his application by reason of his helpless condition arising from the loss of his limb, for the claimant states as his reason for the delay that he knew nothing of his right to a pension until he removed to Kentucky, about three years before his application was made. The regulation then made by Mr. Marcy, however just and proper it may be in itself, has no application to the present claim.

We think the claimant has no cause of action.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 62.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

EZRA T. MARNAY, ADM'R., *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Letter from the Commissioner of Pensions, transmitted from the House of Representatives and returned to that House.
3. Claimant's brief.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The petition of Ezra T. Marnay, of Rouse's Point, in the county of Clinton, in the State of New York, one of the children of Louis Marnay, deceased, begs leave respectfully to represent unto this honorable court, that he is interested, as one of the heirs at law of the said Louis Marnay, in a claim which the said Louis Marnay had against the United States for services in the revolutionary war; that his interest in said claim arises from the consideration that he is one of the chil-

dren, and is administrator of the estate of the said Louis Marnay, who died intestate on or about the second day of January, A. D. 1829.

And your petitioner further shows to this honorable court, that the said Louis Marnay enlisted for and during the war, in Colonel Moses Hazen's regiment in the continental line, and served therein to the close, or until discharged by Congress; and that the before mentioned claim is founded on a resolution of Congress, passed the 15th day of May, 1778, which provides that those soldiers who enlisted for and during the war, and continued in its service until its termination, were entitled to the reward of eighty dollars; and for which your petitioner is informed a certificate issued, bearing interest at the rate of six per cent., on or about the first day of March, 1784, which certificate, if ever delivered, is now lost; and that said reward has never been paid or transferred, as your petitioner is informed and verily believes true.

And your petitioner further shows that he made application by petition to Congress for the payment of said claim in the year 1854, but is not informed that any action has been had thereon, and now prays second petition, and the proceedings therein, may be filed in this court as a part of his case.

Your petitioner therefore prays that this honorable court will examine said claim and report a bill to Congress for the payment thereof, with the interest thereon, unto the heirs or legal representatives of the said soldier, or such other order or bill as to your honors shall seem fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

C. K. AVERILL,
Attorney for Claimant.

Dated MARCH 11, 1856.

STATE OF NEW YORK, }
County of Clinton, } *ss.*

Calvin K. Averill, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that the petition above, by him subscribed, contains the truth, according to the best of his information and belief.

C. K. AVERILL.

Sworn and subscribed before me, this 11th day of March, A. D. 1856.

M. VAN DEVOORT,
Justice of the Peace.

IN COURT OF CLAIMS.

EZRA T. MARNAY, administrator, &c., *against* THE UNITED STATES.	Claimant's points and brief.

1. This claim, like the claims of officers under the resolutions of the 21st of October, 1780, and March 22, 1783, must be regarded as in the nature of an express contract.—(See Mayo & Moulton, Introduction, vii, p. 177.)

This claim is founded on the resolution of Congress of 15th of May, 1778, and entitled the ancestor of claimants to the reward of $80 for services rendered and continued to the end of the war. Here was work, labor, and services performed as the consideration for the reward, and the books show him entitled to the certificate on the first day of March, 1784, and does not show it paid.

2. As a debt or claim due, and payment withheld, all the legal consequences attach between the United States and the claimants, as in the case of individuals, as it respects the claim of interest.

And Congress designed that interest should be paid "on all claims and to all creditors of the United States from the time payment became due."—(See Compend., &c., on Revolutionary Claims, Doc. No. 42, for 1837-'38.)

3. Congress has acknowledged the obligation to pay the *principal* in an analogous case.—(See Colin McLaughlin's bill 249, passed 2d session, 21st Congress. Report 1st session, 21st Congress, No. 194, as follows:

REPORT.

"The petitioner claims, and satisfactorily proves, that by his services as a sergeant in Colonel Moses Hazen's regiment in the army of the revolution, to the end of the war, (having then been discharged and honored with the badge of merit,) he became entitled to the reward of $80 offered by the resolve of Congress of May 15, 1778.

"The only question remaining is whether he received this reward?

"No register or other evidence has been found showing that it has ever been paid. The petitioner has made oath, in an accompanying affidavit, that he has never received it.

"The character of the petitioner for veracity is supported by certificates of respectable individuals acquainted with him.

"The committee believe, under view of all the evidence, that it would be unjust to withhold the reward from him, and therefore report a bill directing the payment to him of the original sum of eighty dollars."

C. K. AVERILL,
Attorney for Claimant.

EZRA T. MARNAY, administrator of LOUIS MARNAY,
vs.
THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court.

The claim of Ezra T. Marnay, who appears by the evidence in the case to be the administrator of the estate of Louis Marnay, is as follows:

He states that Louis Marnay was a captain in the revolutionary army, and served to the end of the war, or until he was reduced or retired. By the resolution of Congress of October 21, 1780, it was provided that the officers who should continue in service to the end of the war should be entitled to half pay during life, to commence from the time of their reduction. By the resolution of March 22, 1783, it was provided that officers then in service, and who should continue therein until the end of the war, should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum, as Congress should find most convenient, instead of half pay promised for life by the resolution of October 21, 1780. By the resolution of March 8, 1785, it was provided that the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half pay or commutation with those officers who retired under the resolves of the 3d and 21st of October, 1780. The petitioner states that the half pay or commutation provided for in either of the forgoing resolves has never been paid, but remains still due, and that the claim was presented to Congress in the years 1853 and 1854.

The first question in this case is, whether the claimant is not barred by the resolutions and statutes of limitations? We have recently had occasion to examine a similar question in the case of Chamberlin *vs.* The United States. The resolution of November 2, 1785, provided that all persons having claims for services performed in the military department should exhibit them for liquidation to the commissioner of army accounts on or before the 1st day of August, 1786, and that all claims under this description which might be exhibited after that period should forever thereafter be precluded from adjustment or allowance. The resolution of July 23, 1787, provided that all persons having unliquidated claims against the United States should exhibit a particular abstract thereof to the Comptroller of the Treasury within one year from the date of the resolution, and all accounts not exhibited as aforesaid should be precluded from settlement or allowance. By the first section of the act of March 27, 1792, (1 Statute, 245,) the operation of the above resolutions, "so far as they have barred, or may be construed to bar, the claims of any officer, soldier, artificer, sailor, or marine of the late army or navy of the United States, for personal services rendered to the United States in the military or naval departments shall, from and after the passing of the act, be suspended for and during the term of two years." The first section of the act of February 12, 1793, (1 Statute, 301,) provides that "all claims upon the United States for services or supplies, or for other cause, matter, or thing furnished or done previous to the 4th day of March, 1789, whether founded upon certificates or other written

documents from public officers or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the 1st day of May, 1794, shall forever after be barred and precluded from settlement or allowance."

It is not alleged or proved that this claim was presented at the treasury before the 1st day of May, 1794, and, as we decided in the case of Chamberlin *vs.* The United States, the claim is now barred by the statute of limitations. It is, therefore, unnecessary to examine the question whether Louis Marnay was a captain in the army, as alleged in the petition.

It is also alleged that there was an error in the settlement with Louis Marnay made on the 25th of January, 1786, because he is therein credited with $12 per month for fifty-nine months' service, whereas he should have been credited with $40 per month for such service, being the pay of a captain. But this claim is barred by the act of February 12, 1793, above cited. It is not a balance entered in the books of the Register of the Treasury, which would be saved by the proviso in that act, for no balance appears to his credit on the books.

The claim for bounty land should, according to the decision in the case of Chamberlin, be presented at the proper office in the Department of the Interior; and as a tribunal is provided for the investigation of such claims, we cannot certainly at present undertake to inquire into its validity.

35TH CONGRESS, 1st Session, } SENATE. { MIS. DOC. No. 63.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ARNOLD HARRIS, ADM'R., *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Solicitor's brief.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims:

The declaration of the administrator in behalf of the heirs of General Robert Armstrong, late of the State of Tennessee, respectfully shows:

That at the battle of Enonochopko, under command of General Jackson, Armstrong was a lieutenant in the life-guard volunteer service of the United States, from the State of Tennessee. The captain (Deadench) being then absent at home, he was in command of said company, acting as captain. That in said battle he received a severe and dangerous wound on the left hip, which, in the opinion of two distinguished citizen surgeons, subjected him to a total disability, and which they have certified to.

He did not, before 1845, apply to have his name placed on the list of invalid pensioners, through, perhaps, a false pride, and because he was during the time in comfortable circumstances. But these having changed, he preferred his application, and then it was agreed by the Commissioner of Pensions that he should be placed on said list, the pension to commence from that date; but which was declined to be received by him, for reason that he conceived it ought to commence from the date of the wound, January 23, 1814.

Thereafter he brought the claim to the consideration of the Senate, and on the 3d of February, 1847, a bill was reported by Mr. Senator Crittenden, allowing him twenty dollars a month from the date of disability, 1814, during life; but on it no definite action was had.

The proofs then had in regard to this case accompany this memorial, which confirm the statements offered above.

At various times, in meritorious cases, the pension has been made to commence from the date of the wound, a memorandum of which will be produced at the hearing of the case. They are believed to be in conformity with existing law.

The act of August 2, 1813, section 2, says: "Any officer, of volunteers or militia, who shall be disabled by known wounds received in the actual service of the United States while in the line of his duty shall, on substantiating his claim, be placed on the list of invalids, at such *rate* of *pension* and under such regulations as are provided by said act of 10th April, 1806, or may hereafter be provided by law."

Here is a vested right, which results to the party at the instant the wound is received, provided the claim be substantiated "*in the manner* described by an act entitled 'An act to provide for persons who were disabled by known wounds received in the revolutionary war,' passed the 10th April, 1806."

This act was retrospective as to services rendered twenty or thirty years before; and, to avoid impositions, might well say, as it did, "*that the pension should* commence on the day when the claimant completed his testimony."

But the latter act of 2d August, 1813, contains no such clause. The first act was a past gratuity bestowed; the latter was a proffered boon of the country to induce her citizens to her defence; and thenceforth was an absolute and binding contract to both parties, and which could not be departed from without the consent of the wounded officer or soldier.

But the Pension Commissioner entertains the opinion that the 2d section of the act of the 15th May, 1820, withholds the pension, except from the time when the proof is completed. It says:

"SEC. 2. The right any person now has, or may hereafter acquire, to receive a pension, be considered to commence at the time of completing his testimony, pursuant to the act hereby revived and continued in force."

This retroactive law granting pensions, 10th April, 1806, having been limited to six years, had expired in 1812; and the object of this act of 1820, (May 15,) as its title clearly declares, was to revive and continue it; and hence, by settled rule of construing statutes, the qualification of right set forth in the 2d section can have no relation,

no application, to any other than those pension cases of the revolutionary war which were the result of Congress' liberality, and not to the cases that arose under the act of 1813. Those arising under the acts of 1806 and 1812, being mere gratuities to remunerate for services which had been already rendered, might be subjected to any restriction which Congress chose to interpose.

But very different are the provisions of the act of August 2, 1813. Then the country was engaged in war, and materially embarrassed were its finances. To invite to its defence, every available allurement had to be resorted to, to bring out the defences of the country. Large money bounties and lands were offered to the enlisted soldier; and to the volunteers and the militia, pensions in cases of death or disability in the service. It was an offered contract by the government with its volunteer officers and soldiers, which in good faith it was bound to regard; and if ever the act of the 15th of May, 1820, which relates only to revolutionary pensions, could be made applicable in its terms to all pensions, the answer to such assumption would be, Congress cannot abrogate or change a contract without consent of the parties in interest.

It was a proposed contract, offered on the part of the government, and which, in the same year, was accepted by Armstrong; and very shortly thereafter, when fearlessly contending with the foe, he received a wound imposing a total disability. Six years thereafter the act of May, 1820, was passed, the provisions of which do not apply to his case; and if they did, being a violation of contract, they do not affect his right.

JNO. H. EATON,
Counsel for Claimants.
ARNOLD HARRIS,
Administrator of Robert Armstrong.

IN THE COURT OF CLAIMS.—NO. 293.

HARRIS, ADMINISTRATOR OF ARMSTRONG, *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

This claim is made under the second section of an act approved August 2, 1813, (3 Stat. 73,) which provides:

"That if any officer, non-commissioned officer, musician, or private, of the militia, or of any volunteer corps, shall be disabled by known wounds received in the actual service of the United States, while in the line of his duty, he shall, upon substantiating his claim in the manner described by an act entitled 'An act to provide for persons who were disabled by known wounds received in the revolutionary war,' passed the 10th day of April, 1806, be placed on the list of invalids of the United States, at such rate of pension and under such regulations as are provided by said act, or as may hereafter be provided by law."

The petitioner avers that his intestate, being an officer within the

description of this act, was disabled by a wound received in actual service in the line of his duty, on the 23d of January, 1814 ; and in 1845 applied for a pension, which the Commissioner of Pensions offered to pay, commencing with that date ; but the applicant declined to receive payment, unless it were granted to commence January 23, 1814.

The petitioner seeks therefore in this suit to recover the arrears from January 23, 1814, to ———, 1845.

The act of 1813 promises that the wounded officer shall be placed on the list of invalids only upon substantiating his claim. This condition, as seems to be admitted, was not complied with till the year 1845. He was not then entitled to be placed on that list till 1845.

It is contended that on being placed on this list he was entitled to receive arrears of pension from January 23, 1814. No act or regulation is cited to support this position, except that of 1813, which, on the part of the United States, is denied to have such effect.

On the contrary, the act of 1813 refers to other acts and to regulations to ascertain the commencement of the pension ; and the acts and regulations referred to fix a date subsequent to the receipt of the wound for the commencement of the pension.

1st. It refers to the act of April 10, 1806, (2 Stat. 376,) for the rate of pension and the regulations under which the officer is to be placed on the list, and a provision in the fourth section of that act, prescribing that pensions shall commence at the date of completing the testimony.

A provision determining the commencement of a pension is a regulation. Attorney General Taney so decided in effect in an opinion given May 31, 1832, and this provision in the act of 1806 is referred to in the first section of the act as a regulation.

Being one of the regulations provided by said act, it is as such referred to by the act of 1813, and made an element in the promise of pension.

2d. The act of 1813 subjects the rights of the officer to regulations to be thereafter provided by law. The second section of the act of May 15, 1820, (3 Stat. 596,) provides a regulation upon the subject prescribing that no pension shall commence until the testimony be completed.

JNO. D. McPHERSON,
Deputy Solicitor, Court of Claims.

ARNOLD HARRIS, Administrator,
vs.
THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

It is alleged that Robert Armstrong, the intestate, on the 23d of January, 1814, received a wound at the battle of E-non-o-chop-ko, which subjected him to a total disability; and that, under the act of August 2, 1813, he was entitled to a pension from the date of his disability.

The fourth section of the act of April 10, 1806, (2 Stat., 376,) provides, "that every pension, or increase thereof, by virtue of this act, shall commence on the day when the claimant shall have completed his testimony before the authority proper to take the same." The act itself is entitled, "An act to provide for persons who were disabled by known wounds received in the revolutionary war."

The second section of the act of August 2, 1813, (3 Stat., 74,) provides "that if any officer, non-commissioned officer, musician, or private of the militia, or of any volunteer corps, shall be disabled by known wounds received in the actual service of the United States, while in the line of duty, he shall, upon substantiating his claim in the manner described by an act entitled 'An act to provide for persons who were disabled by known wounds received in the revolutionary war,' passed the tenth day of April, one thousand eight hundred and six, be placed on the list of invalids of the United States, at such rate of pension, and under such regulations as are provided by the said act, or as may hereafter be provided by law."

The question is, whether Robert Armstrong was entitled to a pension from the 23d of January, 1814, the date of his disability, or from the year 1845, when his testimony was completed.

The claimant argues that the act of 1806 might well provide that the pension should commence on the day when the claimant completed his testimony, because it "was a past gratuity bestowed; whereas the act of 1813 was a proffered boon of the country to induce her citizens to her defence," and thenceforth was a contract binding upon both parties. This remark, in relation to the act of 1806, is not exactly correct. That act did not provide merely for the payment of a gratuity. It merely provided for carrying out the resolution of August 26, 1776, which promised every person so disabled in the service of the United States as to be incapable of getting a livelihood a certain pension. The act of 1806, therefore, cannot be considered as giving merely a gratuity, and the alleged distinction between it and the act of 1813 does not exist. The act of 1813 provides expressly for the granting of a pension under such regulations as are provided by the act of 1806, or may hereafter be provided by law. Now the act of 1806 provides that pension should commence from the time of the completion of the testimony, and this reference to the act of 1806 has the same effect as if the fourth section of that act had been reenacted in the act of 1813.

It seems to us, therefore, that this is a perfect answer to the claim.

But there is also another answer to the claim. The second section of the act of 1813 enacts that a pension may be granted under such regulations as are provided by the act of 1806, "or may hereafter be provided by law." The second section of the act of May 15, 1820, (3 Stat., 596,) enacts "that the right any person now has, or may hereafter acquire, to receive a pension in virtue of any law of the United States, be considered to commence at the time of completing his testimony pursuant to the act hereby revived and continued in force." The act thus continued in force was the act of April 10, 1806. It is difficult to perceive how any pension, granted in compliance with the acts of 1806, 1813, and 1820, can, in pursuance of law, commence

from any other period than the time when the proof is completed, for these acts are so expressed in their terms as to leave no room for doubt.

We are therefore of opinion that the construction given by the Commissioner of Pensions to these acts was correct. It is stated in the petition that the Commissioner was of opinion that Robert Armstrong was entitled to a pension from some period in the year 1845, being the period when the proof was completed. We think the petitioner should apply there and receive the pension from the time when the proof was completed. As that tribunal has jurisdiction of the claim, and has correctly construed the law, we think the claimant has no cause of action.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 64.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JEREMIAH M. WILLIAMS AND OTHERS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents exhibited by claimants as proof, and transmitted to the House of Representatives.
3. Claimants' brief.
4. United States solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 7th day of December, A. D. 1857. [L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the Court of Claims of the United States:

The petition of Jeremiah M. Williams, of Claverack, in the county of Columbia in the State of New York, in behalf of all the children and grandchildren of Thomas Williams deceased, begs leave respectfully to represent unto this honorable Court that he is interested as one of the children of the said Thomas Williams, in a claim which the said Thomas Williams had against the United States, for services in the revolutionary war.

That his interest in said claim arises from the consideration that he is one of the children and heirs-at-law of the said Thomas Williams, who died ———, on or about the —— day of ———, A. D. ———, and in consideration of certain resolves of Congress hereinafter named.

And your petitioner further represents unto this honorable Court

that the said Thomas Williams was commissioned by Congress a quartermaster and served in the continental service in the revolutionary war, and served as such to the close, or until reduced or retired. That by a resolution of Congress of October 21, 1780, it was provided that the officers who should continue in the service to the end of the war, should be entitled to half-pay during life, to commence from the time of their reduction; and by a subsequent resolution of Congress of March 22, 1783, it was further provided that officers then in service, and that should continue therein to the end of the war, should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum, as Congress should find most convenient, instead of half-pay promised for life, by the resolution of the 21st of October, 1780. That by a resolution of Congress of March 8, 1785, it was further provided, that the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half-pay or commutation with those officers who retired under the resolve of the 3d and 21st October, 1780.

And your petitioner further represents and shows to this Court, that the commutation money, or half-pay, provided for in either the foregoing resolves of Congress, has never been paid, but remains as a claim due to the said Thomas Williams from the United States.

And your petitioner states that the following are all the children and grandchildren and heirs-at-law of the said Thomas Williams, entitled to and owners of this claim viz: Jeremiah M. Williams, Thomas Williams, Maria Walker, Albertine, Julia, Helen, Cornelia and Van Ness Williams, grandchildren and children of Cornelius Williams dead.

Also your petitioner claims 200 acres of land, as per resolution of Congress, Sept. 16, 1776.

Also claims $604.388 depreciation on pay certificates due May 30, 1779, and interest.

Your petitioner therefore prays that this honorable Court will examine into the justice and equity of the said claim, and report a bill to Congress providing for the payment thereof, together with the interest thereon, unto the heirs or legal representatives of the said officer; or such other order or bill as to your honors shall seem fit and proper to report in the premises.

And your petitioner, as in duty bound, will ever pray.

C. K. AVERILL,
Attorney for Jeremiah M. Williams and others.

WASHINGTON, *January* 23, A. D. 1856.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss.*

Calvin K. Averill, now in Washington, in the county of Washington in the District of Columbia, being duly sworn, doth depose and say, that the petition above by him subscribed contains the truth according to the best of his information and belief.

C. K. AVERILL,

Sworn and subscribed before me, this 23d day of January, A. D. 1856.

E. H. BATES,
Justice of the Peace.

IN COURT OF CLAIMS.

JEREMIAH M. WILLIAMS and others, Claimants, *vs.* THE UNITED STATES.	Claimants' brief and points.

I. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo and Moulton's "Pension and Bounty Lands," 3; resolution of August 24, 1780, Ib. 6; resolution October 21, 1780, Ib. 7; resolution March 22, 1783, §2, Ib. 9; resolution March 8, 1785, Ib. 10;) Ib. in the introduction, pages XXI, XLII.

II. Is entitled to 200 acres land; resolution of Congress, September 16, 1776; resolution October 3, 1780.

III. Is entitled to be made good, with the interest for depreciation on pay certificates.—(See special act, William Baynham's case, 11th Congress, 2d session, April 20, 1810.)

The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson and Lieutenant Price's case in October, for the relief of, March 2, 1833; Mayo and Moulton, 180; Lieutenant Wilson's case, act February 27, 1833; his heirs allowed seven years' half-pay with interest, per resolution of Congress, August 24, 1780, Ib. 175.)

Doctor Axon's case, act June 15, 1832; commutation with interest, Ib. 163.

Captain McDuff's case, act April 2, 1830, section 2; land given him the same as to other captains in the continental line, Ib. 148.

Lieutenant Jacob's case, act July 14, 1832; commutation and interest allowed him, Ib. 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832; commutation and interest allowed to heirs, Ib. 168.

Colonel Thornton's case, act February 9, 1833; commutation and interest to administrators, one fourth to widow, and residue distributed to persons entitled according to the laws of Virginia, Ib. 173.

John Thomas and Peter Foster's cases, act March 2, 1833; commutation and interest as officers, Ib. 178.

Richard Henly courts case, act March 2, 1833; commutation to his widow and interest, Ib. 178.

Captain Triplit's case, act March 2, 1833; commutation and interest, Ib. 179.

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

HEIRS OF THOMAS WILLIAMS,
vs.
THE UNITED STATES.
No. 481.

Brief of the United States Solicitor.

The petition, as explained by the brief, alleges that Thomas Williams was appointed a quartermaster in the third New York battalion, and held that commission from November 21, 1776, until May 30, 1779; that he was then appointed a lieutenant, and served to the end of the war. Such service would entitle the officer to half-pay for life, under resolution of October 21, 1780, and for this claim is now made.

It is proven that Williams was commissioned quartermaster of the third New York battalion, November 21, 1776, the original commission being produced; and though not proven, it is not denied that he served till May 30, 1779.

It is denied that he was ever in service later than this last date, May 30, 1779.

The evidence relied on to prove service after May 30, 1779, is contained in what is called the "Balloting Book" of New York; being a record of grants of bounty land to certain officers and soldiers of that State.

This book shows that Williams received two lots of land, amounting to 1,200 acres, for his services in the revolution, being the share of a lieutenant, and such is the rank set opposite his name in the book.

For the United States, it is contended that lieutenant was his rank as quartermaster, and that the land was due for his services as quartermaster; and consequently neither one nor the other affords any evidence of service in any other grade—certainly not of service as lieutenant *subsequent to* his service as quartermaster.

By the account filed as an exhibit with the petition, and which purports to be stated by Williams himself, his service as quartermaster is stated to have continued till May 30, 1799. The resolution of May 27, 1778, proved that all quartermasters should be selected from subalterns of the line, retaining, however, their rank in the line. The presumption is, therefore, that Williams was a lieutenant during a part of his service as quartermaster; and the allegation that he served as lieutenant after May 30, 1779, is deprived of all foundation, for it proceeds on the assumption that the commissions of quartermaster and lieutenant were distinct; and that as Williams entered the service as quartermaster, and served as such till May 30, 1779, his service as lieutenant must have been subsequent. The answer above given to this is, that he held both commissions at once.

Some stress is laid on the fact that his commission is as quartermaster of the *third battalion*, whereas he appears in the Balloting Book to be lieutenant of the *third regiment*. The answer to this is as follows: In the earlier legislation of Congress the troops were enumerated by battalions; though regiments are also spoken of as in service. The third battalion and the third regiment may possibly have been the same corps, or the battalion was changed into a regiment; and, according to the account exhibited, they were the same, for in that

account Williams is styled quartermaster of the *third regiment*, and his pay as such is charged as commencing January 1, 1777, less than six weeks after he was commissioned in the *third battalion*. By that account his service as quartermaster of the third regiment is admitted to have ceased on the 30th of May, 1779.

It only remains to show that the grant of bounty land to him implies no service later than May 30, 1779.

Of the land received by Williams, two hundred acres were due to him under the resolution of Congress of September 6, 1776, and one thousand acres under the resolution of the New York assembly of March 27, 1783. By the former, Williams was entitled to the land, if he continued in service "until discharged by Congress;" and by the latter he was entitled, if he was "deranged by any acts of Congress subsequent to the 16th of September, 1776." As to the duration of service, therefore, the grant of bounty land only proves that Williams was in service subsequent to September 16, 1776; for, if discharged or deranged by act of Congress at any time after that date, he was entitled to all the land he received.

It is not incumbent on us to show that he was discharged or deranged; we have only to show that the Balloting Book does not prove his service to the end of the war; nevertheless, the following statement may with propriety be made here, in order to show that Williams was in fact discharged on or before the 30th of May, 1779.

By resolution of January 10, 1778, three members of Congress and three members of the board of war were constituted a committee to repair to the headquarters of the army, and in conjunction with the commander-in-chief, "to form and execute a plan for reducing the number of battalions in the continental service." This committee continued in existence till November 24, 1778, (see proceedings of May 19, July 9, August 10, October 12, &c.,) when it was dissolved, and resolutions were passed directing that lists of officers as arranged by the committee be sent to the board of war and be recorded; and that new commissions be given the officers according to that arrangement, and the board of war was directed to go on and complete the arrangement of the army. In the same resolutions it was recited that many officers had become supernumerary, and that many more would become supernumerary under the arrangement in progress, to each of whom one year's extra pay was given as a gratuity.

Under these resolutions, those retained in service had evidence thereof in a record kept for the purpose, and in the new commissions given them; all others were discharged, and no provision was made for procuring or filing returns of those they discharged. We contend that the resolutions on this subject in effect legislated all officers out of service; or at least that the presumption is that every officer went out of service, unless it be shown that he was retained.

This statement, too, is an answer to the position taken by petitioner, that having shown the officer to have been once in service in the early part of the war, (1776,) the burden of proof is on the United States to show that he was discharged.

It is proper to notice some other testimony which it has been attempted to draw from the Balloting Book in favor of this claim.

It is remarked for the petitioner, that Williams is not on the list of

resigned officers, (pp. 108, 109, 110.) The heading of that list is "Original return of officers resigned, &c." The scope of this list is not shown. It contains officers who were deranged, who died, who resigned, who were left out of the rolls, who were dismissed, who were cashiered, who were transferred, who deserted, who were killed in action, and who served to the end of the war; and the "&c." in the caption of the list must include all these classes as well as that of resigned officers.

The absence of Williams' name from this list is therefore as good evidence that he did not serve to the end of the war as it is that he did not resign or become supernumerary. The list is evidently a partial one, made for some purpose not now understood. It embraces but comparatively few names, and certainly does not contain one-fourth of the officers of the different classes mentioned in it. For example, it names only two officers killed in action during the whole war.

It is also said he does not appear on the list of deranged officers, (Balloting Book, p. 91.) There is no evidence that the list was intended to contain all the deranged officers. It does not contain all; some who are so marked on the list at p. 108 are not on this.

This book furnishes evidence against this claim. At page 80 commences a return of the officers and soldiers who served to the end of the war. Williams is not on that return. This return embraces three regiments, which were all that were required of New York by the resolutions of October, 1780. They were numbered 1st, 2d, and artillery. If Williams served to the end of the war, he must have served in one of these; but he is not so returned. Every officer of every company is named, and he is not among them; on the contrary, he is designated only as an officer of the 3d, and this regiment did not serve to the end of the war. If the regiment itself did not serve to the end of the war, where and how did he serve?

This claim is barred by limitation under the resolutions of November 2, 1785, (IV Journals, 603,) and July 23, 1787, (Id. 762,) and act of Congress approved February 12, 1793, (1 Stat. 301.) In consequence of this I have not felt it necessary to ask the Court to put the departments to the trouble of causing search to be made through the 400 volumes of Washington papers in the State Department, and the voluminous records in the Pension Office. The interruption to public business caused by such searches could hardly be justified in a case like the present, already excluded from allowance by law. Were it otherwise, I should not feel warranted in submitting the case without a full examination of the papers referred to.

The petitioner claims also the depreciation on his pay, $604 38, as shown by the account filed and above referred to. This claim is founded on the resolution of April 10, 1780, but the benefits of that resolution are confined to officers in service on or after that day. I think I have shown that Williams was not in service after May 30, 1779. The depreciation accounts were settled by the several States, and the fact that Williams did not recover his depreciation, shows that he was not in service so late as April, 1780. The claim is however barred by the resolutions and statute of limitation above cited.

JNO. D. McPHERSON,
Deputy Solicitor.

JEREMIAH M. WILLIAMS,
vs.
THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This is a claim for commutation money or half-pay, for depreciation on certain pay certificates, and for bounty land. The first two claims should be prosecuted by an administrator. The claim for bounty land may, according to the rules of the department, be prosecuted by the descendants of the person entitled, but that claim is abandoned.

The petition states that Thomas Williams, now deceased, was commissioned by Congress as a quartermaster and lieutenant in the continental service in the war of the revolution, and served as such until the close of the war, or until reduced or retired. The claim for commutation or half-pay is founded upon the same resolutions of Congress upon which the claimants relied in the case of Marnay *vs.* The United States, and Stokely *vs.* The United States. It is not alleged or proved that the claim was ever presented at the treasury before the 1st day of May, 1794, and in accordance with the decision in the cases mentioned the claim is now barred by the statute of limitations, and the claimant has no cause of action.

The second claim is for the sum of "$604 38, depreciation on pay certificates due May 30, 1779, and interest."

On the 10th of April, 1780, Congress resolved that, "when Congress shall be furnished with proper documents to liquidate the depreciation of the continental bills of credit, they will, as soon thereafter as the state of the public finances will permit, make good to the line of the army and the independent corps thereof, the deficiency of their original pay occasioned by such depreciation. * * * It being the determination of Congress that all the troops serving in the continental army shall be placed on an equal footing. Provided that no person shall have any benefit of the resolution, except such as were engaged during the war, or for three years and are now in service, or shall hereafter engage during the war for three years, and are now in service, or shall hereafter engage during the war."

The question now is, whether Thomas Williams was in service at the date of the passage of the resolution.

The resolution of the assembly of the State of New York, of March 27, 1783, provides for bounty land to persons belonging to several different classes, of which it is necessary only to enumerate the following:

"The officers, non-commissioned officers, and privates of the two regiments of infantry, commanded by Colonels Van Schaick and Van Cortlandt.

"Such officers of the regiment of artillery commanded by Colonel Lamb, and of the corps of sappers and miners as were, when they entered the service, inhabitants of this State, and such of the non-commissioned officers of the two last mentioned corps as are credited to this State, as part of the troops thereof.

"All officers deranged by any acts of Congress subsequent to the 16th day of September, 1776.

"All officers recommended by Congress as persons whose days

tion on pay ought to be made good by this State, and who may hold military commissions in the line of the army at the close of the war."

The claimant has produced in evidence the book, well known as the New York Balloting Book, containing a list of the persons entitled to bounty lands under the resolution of the New York legistature. In this book the name of Thomas Williams occurs but once, and that is on page 67, where he is put down as lieutenant in the 3d regiment, which was commanded by neither Van Schaick nor Van Cortlandt, but by Colonel Peter Gansevoort. He does not therefore come within the class first mentioned; nor within the second class composed of certain officers of Colonel Lamb's artillery, &c. He might have come within the class of officers deranged by any acts of Congress subsequent to the 16th day of September, 1776, or he might have belonged to the class of officers recommended by Congress whose depreciation on pay ought to be made good, &c., but there is no evidence showing that he belonged to either of these classes. He might have been entitled to bounty land from the State of New York, as belonging to one of the two classes last mentioned, without having been in service on the 10th of April, 1780. The Balloting Book, therefore, is not evidence to show that he was in service at that date. It is only evidence to show that he was at some time a lieutenant of the 3d regiment.

The claimant has produced in evidence an original commission, dated March 2, 1776, signed by Colonel Wynknoop and Lieutenant Colonel Cortlandt, field officers of the 4th New York regiment, appointing Thomas Williams quartermaster to that regiment. He has also produced a commission, signed by John Hancock, dated November 21, 1776, appointing Thomas Williams "quartermaster to the 3d battalion of the New York forces." This commission is expressed "to continue in force until revoked by this or a future Congress."

Upon the first organization of the army the various corps were styled battalions, and the quota of New York was four battalions.—(Res. Sep. 16, 1776.) Subsequently, upon a reorganization of the army, the various corps were styled regiments.—(Res. May 27, and Nov. 24, 1778.) This accounts for the fact that in the Balloting Book the corps to which he belonged was called a regiment, while in his commission it is called a battalion. In the New York resolution before referred to, no officer below the rank of captain is specifically mentioned, but every subaltern and surgeon's mate is entitled to 1,000 acres; a lieutenant being a subaltern, was also entitled to 200 acres by a resolution of Congress. The course pursued was, that an officer entitled to bounty land under the New York resolution, and also under the resolution of Congress, assigned to the State the land to which he was entitled from Congress, and received the amount of both bounties from the State. This was the reason why Thomas Williams is set down in the Balloting Book as entitled to 1,200 acres of land.

Now there is evidence to show that he was at one time a quartermaster and at another time a lieutenant, but how long the different commissions remained in force does not appear. By the resolution of May 27, 1778, the quartermasters were to be taken from the subaltern officers, and he might at the same time have been both lieutenant and quartermaster, as the quartermaster, being a staff officer, received

a certain pay in addition to his pay in the line. As he held the lineal rank of lieutenant, he is properly so designated in the Balloting Book.

Now his commission was to continue until revoked by Congress, and there is no evidence of its revocation. In the return by Lieutenant Connolly, in the Balloting Book of officers resigned, &c., his name is not returned as resigned. From the small number of officers contained in this list, it would appear to be incomplete; but there is no evidence in the case anywhere tending to show that he resigned. In the absence of all evidence to the contrary, the presumption may perhaps be that he continued to hold his commission in the army on the 10th day of April, 1780, which would entitle him to the depreciation on his pay under the resolution of Congress of that date.

The claimant has produced in evidence a paper, of which the following is a copy:

Liquidation of Thomas Williams', jr., account, late quartermaster 3d New York regiment.

	Time of service.	Wages per month.	Amount of wages paid.	Depreciation of the four eastern States, averaged at several periods as below.	Real value of one dollar at said time in decimals.	Real value of pay received.	Real value of pay due.
	Months.						
To my pay as quartermaster to the 31st Dec., 1777.....	12	27½	330	2.065	.433	139.590	200.410
To my pay as quartermaster to the 31st Dec., 1788.....	12	27½	330	5.882	.170	56.100	273.900
To my pay as quartermaster to the 30th May, 1779.....	5	27½	137½	15.45	.0542	7.452	130.048
							604.358

This paper we cannot consider as competent evidence against the United States. It is not proved to be in the handwriting of Thomas Williams. If it be in his handwriting, it is a mere statement of his claim, and as such is not proof of a debt. It is not authenticated in any way or in any manner, and is not even signed by him. It is entitled to no more weight than if it had been copied into the petition as part of his claim, and of course without additional proof we can not come to the conclusion that he has made out any cause of action against the United States.

But even if the claimant had made out a cause of action it is barred by the resolutions and acts of Congress which have been so distinctly stated in the cases Chamberlin *vs.* The United States, and Marnay *vs.* The United States, that a repetition of them is unnecessary.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 65.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HUGH HUGHES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents received from Treasury Department and transmitted to the House of Representatives.
3. Letters of administration and petition to Congress, transmitted to the House of Representatives.
4. United States solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DICKERSON, ADMINISTRATOR OF HUGHES, *vs.* UNITED STATES.

DISTRICT OF COLUMBIA, }
County of Washington. }

To the honorable the Judges of the Court of Claims:

The petition of the administrator and heirs-at-law of Colonel Hugh Hughes, late a quartermaster in the revolutionary army, would with respect represent unto your honors, that the said Hugh Hughes, early in the year 1776, received the appointment of commissary of military stores, and was subsequently appointed an assistant to the quarter-

master general, then a quartermaster, and continued in service until the spring of 1778, when he resigned; that he was soon after appointed to the office of quartermaster general, and continued in this department until the year 1783; that before any final adjustment of his accounts, to wit: on the 22d day of January, 1789, his papers and vouchers were all destroyed by fire.

Petitioners would further represent, that Colonel Hugh Hughes entered the service of the United States possessed of large real estate, the whole of which was spent in sustaining the cause of independence; and that during his life he was solicitous for an adjustment of his accounts with the government, as have been his heirs since his death; that he always claimed a large amount as due him for monies loaned to and expended for the use of the government, but which he failed to establish, owing to the loss of his papers as before stated.

Petitioners would further represent, that among other large sums, the said Colonel Hughes loaned to the government of the United States the sum of $2,913 76 in specie value, and received therefor loan office certificates as stated in the following letter from the register of the treasury:

TREASURY DEPARTMENT,
Register's Office, December 17, 1845.

SIR: Upon examining the records of continental money received on loan in the year 1778, I find $175,800 entered in the name of Hugh Hughes, D. Q. M., and that loan office certificates for that amount were issued in his favor by the commissioner for New York, all of which have been taken up, excepting the following, viz:

		Dolls.	90ths
No. 3,615, for $200	specie value	100	29
No. 3,733 to 3,736, (4,) for $200 each	do	401	26
No. 7,350, for $200	do	100	29
No. 2,156, for $400	do	145	76
No. 2,158 to 2,161, (4,) for $400 each	do	583	34
No. 2,871 to 2,873, (3,) for $400 each	do	443	42
No. 1,577, for $500	do	182	27
No. 2,898, for $600	do	217	71
No. 1,771 and 1,772, for $1,000 each	do	739	12
		2,913	76

Mr. Dickerson's letter is returned.

The following account remains unsettled on the old government ledger:

SEPCIE ACCOUNT.

Dr.—Hugh Hughes, D. Q. M. U. S., his suspense account for forage, Cr.

1782, April 3. To William Duer..... $1,391 73

I am, respectfully, your obedient servant,

R. H. GILLET.

ALEXANDER RAY, Esq.,
Washington.

It will be perceived by the Court that this letter also shows an outstanding balance on an old ledger *against* Colonel Hughes of $1,391 73, which balance the Register of the Treasury under date of February 11, 1820, says, "might have been regularly accounted for with the commissioner for adjusting the accounts of quartermasters, during the revolutionary war; transcripts were only transmitted of said debits, and his accounts closed on the treasury books, making debit of $1,391 73 in specie." Yet the heirs of Colonel Hughes are willing to allow the said debit as an offset, to that amount, against the balance shown to be due Colonel Hughes—leaving a balance still due of $1,522 03, with legal interest thereon from the 1st day of January, 1783, till paid—which balance and interest was justly due the said Colonel Hugh Hughes in his life time, and since his death due to your petitioners; but although due and payable the said government of the United States has wholly failed and refused, and still doth refuse to pay the same, or any part thereof, although often requested so to do, to the damage of your petitioners twenty thousand dollars.

Your petitioners would further represent, that they memorialized the Congress of the United States for relief; that on the 2d day of January, 1846, their petition was referred to the Committee of Claims in the House of Representatives, and on the 10th day of February following Mr. Rockwell made the following

REPORT.

The Committee of Claims, to whom was referred the petition of the heirs of Hugh Hughes, have examined the matter committed to them, and report as follows:

The petition sets forth that, as early as February, 1776, in the war of the revolution, Hugh Hughes received the appointment of commissary of military stores, and was subsequently appointed an assistant to the quartermaster general, then a quartermaster, and continued in service until the spring of 1778, when he resigned; that he was soon after appointed to the office of quartermaster general, and continued in the quartermaster's department until the year 1783; that he has made repeated efforts to settle his accounts with the proper department of the government, but without success; that his papers were destroyed by fire and his vouchers lost.

The petitioners also refer to two reports of committees in relation to the accounts of Hugh Hughes—one of the Committee of Claims of the House of Representatives, of the 17th February, 1802, and the other of the Committee on Pensions and Revolutionary Claims, of the 23d February, 1820, to which reference will be hereafter made. The present claim of the petitioner is, however, comprised in the following statements in the petition:

"Your petitioners further show that, upon a recent examination of the accounts of Hugh Hughes with the United States, it has been ascertained that loan office certificates were issued to him, and yet remain outstanding to his credit, amounting to the sum of $2,913 76, as appears from the annexed certified transcript from the Register of

the Treasury. Your petitioners, therefore, respectfully ask that Congress will pass a law authorizing the payment of the said outstanding loan office certificates, which remain on the books of the treasury, with interest thereon until paid, said certificates having been lost of destroyed."

The petitioners also state that there remain on the books of the treasury a balance to the debit of Hugh Hughes of $1,391 73; and and although the petitioners claim that such statement of the account is not correct, and no balance was in fact due by Mr. Hughes to the United States, they are understood not to press this claim, but to consent that such balance should be deducted from the amount of the certificates, as shown by the statement of the Register of the Treasury, dated December 17, 1845.

The instances are very rare in which a claim of so ancient a character as this will be allowed by this committee. It is certainly not impossible that such a claim may be passed; and although first presented at the end of sixty years, there may be some cases in which the proof may be so conclusive, and the cause of the delay so fully explained, as to justify the allowance of the claim. But this is not one of those cases. It is true, as appears from the report of the Register of the Treasury, that loan office certificates to the amount of $2,913 76 appear to have been issued to Hugh Hughes, deputy quartermaster, which have not been taken up. It is impossible, at a period so remote from the time of the transaction, to know why this amount should not have been demanded of the government, and how it should appear not to have been paid; and the committee, after so great a lapse of time, think it quite as probable that they actually have been paid by the government to some holder of them, and that, by some mistake, the proper entry was not made, as that any individual should fail to apply to the government for payment for so long a time, or, if lost or destroyed, should fail to prove the loss, and press their claim for remuneration. Nor does it appear, if these certificates have been lost, that they were in the possession of Hugh Hughes, or his heirs, when so lost. They were issued, it is true, to Hugh Hughes; and the claim is, that the presumption is that he or his heirs are the owners until the contrary appears, that the government owe the amount to some one; and if a bond of indemnity is given by the petitioners, the government will be protected, and will only have paid what it was just for them to pay to the persons who are probably entitled to the amount.

In the first place, it is not absolutely certain that this amount is due to any one; and the presumption that certificates of this character, transferable, from hand to hand for years, remaining in possession of the original party, is very slight. Indeed, the presumption is all the other way. It is not the ordinary course even for the original holders of government securities, which are negotiable, to retain them for years in their possession. They are passed from person to person, and in the course of twenty years even a very small proportion of such certificates will be found in the hands of the original parties. This is the ordinary and natural course of things, and there is nothing in this case to lead to a different presumption; and the fact, as appears

from some of the papers, that Hugh Hughes was subsequently embarrassed in his circumstances, renders it highly improbable that he continued to be the holder of these certificates, and yet made no effort to avail himself of the amount either from the government or by a sale to individuals.

But in the judgment of the committee, the presumption against this claim is very much strengthened and rendered almost conclusive by the evidence furnished by the reports of committees of this House; one of the Committee of Claims, of the 17th of February, 1802, to whom was referred two memorials of Hugh Hughes, seeking for a compensation for services as a commissary of military stores and deputy quartermaster general in the American army, and also for a provision for a settlement of his accounts, his books and vouchers having been consumed by fire. This petition was denied, on the ground of want of proof. In this petition no reference was had to these certificates as having been in possession and lost or destroyed, as would most surely have been done if the petitioner supposed himself to have any such claim.

The other report is of the Committee on Pension and Revolutionary Claims, of February 23, 1820, on the petition of the heirs of Hugh Hughes for a settlement of his accounts, and other purposes. No claim was then made by the petitioners in relation to these certificates; the omission in some measure strengthening the presumption against the claim, although the parties in that case appeared in a representative capacity, and would be less informed of their rights than the ancestor would himself be presumed to be.

Your committee have been referred to a number of precedents for the allowance of claims of a similar character, at the first session of the 23d Congress, in which relief was granted by Congress severally to administrators of Michel Gratz, Benjamin Jacob, Samuel Bayard, Joseph Falconer and Benjamin Baird. The committee have examined these precedents, but cannot sanction the principle on which they are based; and even if correct, the facts in this case are such as to require a different result.

The committee are clearly of opinion that the petitioners are not entitled to relief, therefore recommend the adoption of the following resolution:

Resolved, That the prayer of the said petition be denied.

From this report it appears that the Committee of Claims rejected the claim of your petitioners because they "thought it quite probable that they (the loan certificates) had been paid by the government to some holder of them, and that by some mistake the proper entry was not made." To clear away the doubts and probabilities thus thrown around this case by the Committee of Claims, your petitioners respectfully call attention to the following letter from the Register of the United States Treasury:

TREASURY DEPARTMENT,
Register's Office, July 11, 1846.

SIR: I have received your letter of yesterday, bringing to my notice House report No. 222, relating to a certain claim presented by the representatives of Hugh Hughes, in which you propose to me certain questions. I cannot better answer you than by making the following statement: From records of this office it appears that on the 15th of April, 1816, a resolution passed the House of Representatives requiring a compilation of all the outstanding and unpaid loan office and final settlement certificates. This work appears to have been completed on the 5th of January, 1817, and was duly certified by the (then) Register. *I have not heard the correctness of this compilation questioned.* By the regulations of the department, whenever one of these certificates is cancelled it is noted on this compilation. The certificates described in my letter to you of December 17, 1845, as outsanding and unpaid were taken from this work. *In order to be certain that none of them have been paid since January* 5, 1817, I directed a search to be made of payments subsequent to that time. From this examination *it appears that none of the certificates mentioned in my letter to you have since been paid.*

Respectfully yours,

R. H. GILLETT.

ALEXANDER RAY, Esq.

This letter, answering so completely the doubts and apprehensions of the committee as to the fact whether these certificates were still outstanding and unpaid, was never before Congress, as will be perceived from the dates. The adverse report of the committee was ordered to lie on the table February 10, 1846, and the papers were withdrawn from the files of Congress.

Wherefore petitioners pray your honors, after due consideration in the premises, to report a bill for their relief, making an appropriation to pay the said sum of $1,522 03, with legal interest thereon from the 1st day of January, 1783, till paid. And, as in duty bound, your petitioners will ever pray, &c.

ALEXANDER H. EVANS,
Attorney for the heirs

DISTRICT OF COLUMBIA, }
County of Washington. }

Personally appeared before the undersigned authority, a justice of the peace in and for the said county and district, Alexander Ray, who, after being duly sworn, declares that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

Subscribed and sworn to this day of 1855.

IN THE COURT OF CLAIMS.

ON THE PETITION OF REPRESENTATIVES OF HUGH HUGHES.

Brief of United States Solicitor.

This is a claim for loan office certificates, of the possession of which, by the deceased, there is no evidence, but the fact that they appear to have been issued to Hugh Hughes by the printed list, and there is no evidence of their being still due and unpaid, except that they are not noted as paid on that list.

No claim was presented till 1845, and the claim is therefore barred by the resolutions of old Congress and statutes under the present government.—(See vol. 1, p. 691, B. and D. ed., U. S. Laws; see Carson's case, vol. 1, p. 301, L. and B. ed., ib. 355, 437, 562, vol. 3, pp. 425, 696.)

2. If there were no statutory limitations, payment would be presumed from the lapse of time, (Sauber *vs.* Jackson, 2 Wendell, 59; see Owen and Hill's Notes, 1 vol., p. 504, for a full discussion of the subject.) The rule of twenty years was first adopted by courts of equity, and as it is founded in reason, and is found to be a rule essential to justice between individuals, it is difficult to see why it should not apply between individuals and the government, independent of statutory enactment. If payment would be presumed between man and man, why not when the goverment was debtor under like circumstances.

3. Twenty years creates presumption of payment, even when the payee holds the bond and presents it. A much less time is necessary to raise such presumption when the bond is not produced, and no account or explanation given of the failure to produce it.

The fact that it is not entered on a list made out by officers forty years after the issue of the note, and twenty years after it would be presumed to be paid as one of which there was found among the old papers direct evidence of payment, does not at all lessen the weight of the presumption in favor of its having been paid.

The reasoning on which that presumption arises does not depend at all upon the obligor's being able to show affirmatively a payment, or any evidence to establish payment. It arises by force of the fact alone that so much time has been elapsed, and no evidence is required to support it.

4. Independently of boththe statutory bar and the legal presumptions a jury would, on consideration of the facts of this case, find for the government.

1. Because, although there is evidence of the issue of the certificates, as they were negotiable, it is incumbent on the party to show that the property in them continued in him and his heirs.

This is improbable, and would not be presumed, because it is matter of history that but few of such certificates continued in the hands of the first holders, and there is no evidence tending to prove that the property remained in Hughes. If he had died seized of it, it would have

been inlisted the inventory of his estate, and as that is not shown, the probability of its having been negotiated is confirmed. Whether paid or not is immaterial, therefore, as it is certain that Hughes did not die possessed of it.

2. But is the presumption of payment accruing from him, and the non-production of the certificate, at all rebutted by the fact that the paper was not found among the rubbish in the Treasury Department in 1817, when the list was made out.

We have a letter from Mr. Gillet, former Register, written to the claimant's agent, in which he says that *he never heard that the list was incorrect*. This is not an official letter from Gillet. It states no fact of any direct bearing on the question; and although it was designed to controvert Mr. Rockwell's report, it does not do so.

3. The fact that the notes in this case were payable to Hugh Hughes, *or bearer*, is no evidence at all that the said Hughes was ever the owner of them, any more than a bank note, which is payable to the cashier, teller, or bearer. This would be true in any case, but when it appears from the petition that this person was an officer of the government, this is still more clear.

4. But it further appears that Hugh Hughes was indebted to the government, and a balance is found against him on the books of the Treasury, which remain. It is possible that these certificates were placed in his hands for the use of the government as quartermaster; for that reason his name may have been put in the certificates. If so, they would have been charged to him. But instead of a balance appearing to his credit, as there would be in case these had been accounted for, the reverse is true, and a balance appears against him.

M. BLAIR,
United States Solicitor.

DICKERSON, ADMINISTRATOR OF HUGHES,

vs.

THE UNITED STATES.

BLACKFORD, Judge, delivered the opinion of the Court.

This is a claim by the administrator of Hugh Hughes, deceased.

The petition alleges that in 1788 loan office certificates, amounting to 175,800 dollars were issued by the government to the intestate; that of those certificates the sum of 2,913 dollars and 76 cents has never been paid; that the sum of 1,391 dollars and 73 cents appears on the government ledger to the debit of the intestate; and that the balance of 1,522 dollars and 3 cents, with interest from the first of January, 1783, is now due to the claimant, as administrator aforesaid.

The evidence produced by the claimant shows that said certificates, amounting to 175,800 dollars, were issued to the intestate at the time stated in the petition; that there is nothing in the Treasury De-

partment to show that a part of those certificates, amounting to 2,913 dollars, have ever been paid; and that the government ledger shows a charge against the intestate of 1,391 dollars and 73 cents. But the said certificates, amounting to 2,913 dollars, alleged to be outstanding, and on which this claim is founded, are not produced to the court; and we are to decide whether, under the circumstances of the case, the claimant can recover without producing those certificates.

The following is an extract from a communication to this Court from the Secretary of the Treasury relative to this claim:

"In answer to your request for any other information in this department tending to elucidate said claim, permit me to add that the loan office certificates, issued under the authority of the Congress of the confederation, were made by their terms, as prescribed by the resolution of 3d of October, 1776, payable to the person making the loan, or *bearer*. Being thus negotiable by mere delivery, like a bank note, this department, in redeeming them, has invariably declined, as appears by its records, paying the persons, or their representatives, to whom they were originally issued, unless the certificates were presented here, or sufficient proof of their actual destruction while in their possession. The mere fact of their being issued to a person has not been regarded as affording the slightest evidence of subsequent ownership."

The Secretary has thus given us the practice of his department. We are of opinion that the person claiming payment of loan office certificates, which are payable to bearer, can have no right to recover on them in this Court if he do not produce the certificates, or show to our satisfaction that they have been lost or destroyed whilst they were his property. It will be presumed, if such loss or destruction be not shown, that the certificates have been paid, or that some person other than the claimant is entitled to the money.

It appears that in 1802 the intestate himself applied to Congress for compensation for certain services during the revolution, and for a settlement of his accounts, alleging his vouchers to have been burned; but he made no claim on account of any loan office certificates. And it appears, also, that in 1820 the heirs of the intestate made a similar application to Congress, saying nothing in their petition about loan-office certificates. The committees to which the claim in those cases was referred, made adverse reports, and stated that there was a considerable sum charged on the books against the intestate.—(American State Papers, title "Claims," pp. 255, 706.)

In 1845 the heirs of the intestate petitioned Congress for payment of the loan office certificates now sued on, the petition alleging the certificates to have been lost or destroyed. That was the first application to Congress, so far as we are informed, for payment of these certificates. The application failed. The report of the committee in that case, adverse to the claim, is copied into the petition filed in this Court by the present claimant.

It is alleged in the petition to this Court that, on the 22d of January, 1789, the papers and vouchers of Hugh Hughes were destroyed by fire; and there is an affidavit made by Alexander Ray, in 1855,

and attached to the petition, stating that the facts set forth in the petition are true to the best of his knowledge and belief; but that affidavit is not sufficient to show the loss or destruction of any loan office certificates belonging to said Hughes. A fatal objection to that affidavit, were there no other, is, that it does not state that, at the time of the fire, the certificates were the property of Mr. Hughes, and were among the papers destroyed.

Our opinion is, that the claimant has no cause of action.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 66.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN M. THORNE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857. [SEAL.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of John M. Thorne, of the city of New York, to the Court of Claims.

Your petitioner respectfully represents, that he has served the United States in the capacity of United States weigher at the port of New York, to which office he was duly appointed; and that he has not received for his services the full amount of compensation by law directed to be paid, a part thereof having been illegally withheld.

The claim of your petitioner is founded on the provisions of the 2d section of the act entitled "An act to establish the compensations of the officers employed in the collection of the duties on imports and

tonnage, and for other purposes," approved March 2, 1799, together with the first section of the act entitled "An act to increase the compensations now allowed by law to inspectors, measurers, weighers, and gaugers, employed in the collection of the customs," approved April 26, 1816.

Your petitioner claims that he was, and still is, entitled to the full compensation established by the said laws, to all the fees that he has earned.

A particular account, hereunto affixed, exhibits the amount of fees that your petitioner has earned, the amount of money he has received, and the balance due to him, which amounts to $18,574 04.

Your petitioner refers to the accompanying pamphlet, entitled "The Claims of United States Weighers, Gaugers, and Measurers," for a statement of the action of Congress and the departments on claims similar to the claim of your petitioner.

Your petitioner represents, moreover, that certain parties having claims, such as that of your petitioner, addressed a memorial to Congress, bearing date March 20, 1854, praying that body to allow their claims or enable them to bring their rights before the Supreme Court of the United States for adjudication; and that the Committee on the Judiciary of the House of Representatives, on August 3, 1854, reported a bill (33d Congress, 1st session, H. R., 536,) to authorize the adjudication of such claims by the courts of the United States, which said bill was not acted on by Congress.

Your petitioner is sole owner of the claim now presented.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

JOHN M. THORNE.

NEW YORK, *June* 22, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

John M. Thorne, being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

JOHN M. THORNE.

Sworn to, this 22d day of June, A. D. 1855, before me.

C. P. JOHNSON,
Notary Public.

IN THE COURT OF CLAIMS.

JOHN M. THORNE *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner alleges that he was duly appointed a weigher at the port of New York; that he served the United States in that capacity; and that he has not received the full amount of compensation allowed him by law, a part thereof having been illegally withheld.

He founds his claim on the second section of the act entitled "An act to establish the compensations of the officers employed in the collection of the duties on imports and tonnage, and for other purposes," approved March 2, 1799, together with the first section of the act entitled "An act to increase the compensations now allowed by law to inspectors, measurers, weighers, and gaugers, employed in the collection of the customs," approved April 26, A. D. 1816.—(Sec. 1, Stat. at Large, p. 707; 3 Ibid., 306.)

He files an account, in which he states that, from the 12th day of February, A. D. 1845, to the 31st day of January, A. D. 1850, he earned fees amounting to the sum of $23,745 26; and that he received for his services $7,450, and for official expenses $4,721 22, equal to the sum of $12,171 22, leaving a balance still due him of $11,574 04.

At the present stage of this case, these allegations are taken to be true.

The petitioner received compensation at the rate of $1,500 a year.

The act of 1799 allowed to weighers, to be paid *monthly by the collector* out of the revenue, and charged to the United States, for the weighing of every one hundred and twelve pounds, and marking every cask, box, or package weighing more than two hundred pounds each, except sugar, coffee, pepper, pimento, and indigo, in bales, bags, mats, canisters, or seroons, with the weight in durable characters, in the district of New York, one cent and a quarter. The act of 1816 allowed an addition of fifty *per cent.* upon the sums allowed as compensation to weighers by the act of 1799, to be ascertained, certified, and paid, under the regulations prescribed by the latter act.

By the act approved March 2, 1833, it was provided "that the Secretary of the Treasury be, and he is hereby, authorized to pay to the collectors, naval officers, surveyors, gaugers, weighers, and measurers, of the several ports of the United States, out of any money in the treasury not otherwise appropriated, such sums as will give to the said officers, respectively, the same compensation, in the year one thousand eight hundred and thirty-three, according to the importations of that year, as they would have been entitled to receive if the act of the fourteenth July, one thousand eight hundred and thirty-two, had not gone into effect."—(4 Stat. at Large, p. 628, chap. 54, sec. 3.)

The act of July 14, A. D. 1832, is the act entitled "An act to alter and amend the several acts imposing duties on imports." It took effect on the 3d day of March, A. D. 1833.—(4 Stat. at Large, p. 583,

chap. 227.) It was modified by the act entitled "An act to modify the act of the fourteenth of July, one thousand eight hundred and thirty-two, and all other acts imposing duties on imports," approved March 2, A. D. 1833.—(Ibid., p. 629, chap. 55.)

The petitioner filed with his petition a pamphlet, entitled "The Claims of United States Weighers, Gaugers, and Measurers," to which he refers for a statement of the action of Congress and the departments on claims similar to his claim.

The act approved June 27, A. D. 1834, provided "that the Secretary of the Treasury be, and he is hereby, authorized to pay to the collectors, naval officers, surveyors, and their respective clerks, together with the weighers of the several ports of the United States, out of any money in the treasury not otherwise appropriated, such sums as will give to the said officers, respectively, the same compensation in the year one thousand eight hundred and thirty-four, according to the importations of that year, as they would have been entitled to receive if the act of the fourteenth of July, eighteen hundred and thirty-two had not gone into effect; and that the clerks employed by the respective collectors, naval officers, and surveyors of the several ports, shall be paid for the year one thousand eight hundred and thirty-three, as if they had been specifically included in the third section of the act of the second March of said year, entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year eighteen hundred and thirty-three;' *Provided, however*, That in no case shall the compensation of any other offices than collectors, naval officers, and surveyors, whether by salaries, fees, or otherwise, exceed the sum of two thousand dollars each per annum; nor shall the union of any two or more of these offices in one person entitle him to receive more than the sum of two thousand five hundred dollars per annum: *And provided also*, That no officer shall receive under this act a greater annual salary or compensation than was paid to such officer for the year one thousand eight hundred and thirty-two; provided, however, that the number of officers to be employed in any of the custom-houses shall not be augmented beyond those now in service: *And provided, further*, That the said collectors, naval officers, and surveyors shall render an account quarterly to the treasury; and the other officers herein named or referred to shall render an account quarterly to the respective collectors of the customs where they are employed, to be forwarded to the treasury, of all the fees and emoluments whatever by them respectively received, and of all expenses incident to their respective offices; which accounts shall be rendered on oath or affirmation, and shall be in such form, and be supported by such proofs, to be prescribed by the Secretary of the Treasury, as will, in his judgment, best enforce the provisions of this section, and show its operation and effect."—(4 Stat. at Large, p. 698–'99, chap. 92, sec. 2.)

By the act approved March 3, A. D. 1835, it was enacted "that the second section of the act making appropriations for the civil and diplomatic expenses of the government for the year one thousand eight hundred and thirty-four is hereby repealed; and that the Secretary of the Treasury be, and he is hereby, authorized to pay to the

collectors, naval officers, surveyors, and their respective clerks, together with the weighers of the several ports of the United States, out of any money in the treasury not otherwise appropriated, such sums as will give to the said officers, respectively, the same compensation in the year one thousand eight hundred and thirty-five, according to the importations of that year, as they would have been entitled to receive if the act of the fourteenth of July, one thousand eight hundred and thirty-two, had not gone into effect: *Provided*, That no officer shall receive under this act a greater annual salary or compensation than was paid to such officer for the year one thousand eight hundred and thirty-two; and that in no case shall the compensation of any other officers than collectors, appraisers, and surveyors, whether by salaries, fees, or otherwise, exceed the sum of fifteen hundred dollars each per annum; nor shall the union of any two or more f these offices in one pers n entitle him to receive more than that sum per annum; *Provided*, That the whole number of custom-house officers in the United States on the first January, one thousand eight hundred and thirty-four, shall not be increased until otherwise allowed by Congress: *Provided, further*, That the said collectors, naval officers, and surveyors shall render an account quarterly to the treasury; and the other officers herein named or referred to shall render an account quarterly to the respective collectors of the customs where they are employed, to be forwarded to the treasury, of all the fees and emoluments whatever by them respectfully received, and of all expenses incident to their respective offices; which accounts shall be rendered on oath or affirmation, and shall be in such form, and be supported by such proofs, to be prescribed by the Secretary of the Treasury, as will, in his judgment, best enforce the provisions of this section, and show its operation and effect: *Provided, also*, That any salary or compensation due for the year one thousand eight hundred and thirty-four shall not be affected by this section."—(4 Stat. at Large, p. 771, ch. 30, § 3.)

By the act approved July 4, A. D. 1836, it was enacted "that the third section of the act making appropriations for the civil and diplomatic expenses of the government for the year one thousand eight hundred and thirty-five is hereby repealed; and that the Secretary of the Treasury be, and he is hereby, authorized to pay to the collectors, deputy collectors, naval officers, surveyors, and their respective clerks, together with the weighers, gaugers, measurers, and markers, of the several ports of the United States, out of any money in the treasury not otherwise appropriated, such sums as will give to the said officers, respectively, the same compensation in the year one thousand eight hundred and thirty-six, according to the importations of that year, as they would have been entitled to receive if the act of the fourteenth of July, one thousand eight hundred and thirty-two, had not gone into effect: *Provided*, That no officer shall receive under this act a greater annual salary or compensation than was paid to such officer for the year one thousand eight hundred and thirty-two; and that in no case shall the compensation of any other officers than collectors, naval officers, surveyors, and clerks, whether by salaries, fees, or otherwise, exceed the sum of fifteen hundred dollars each per annum; nor shall the union of any two or more of those offices in

one person entitle him to receive more than that sum per annum: *Provided, further*, That the said collectors, naval officers, and surveyors shall render an account quarterly to the Treasury; and the other officers herein named, or referred to, shall render an account quarterly to the respective collectors of the customs where they are employed, to be forwarded to the treasury, of all the fees and emoluments whatever by them respectively received, and of all expenses incidental to their respective offices; which accounts shall be rendered on oath or affirmation, and shall be in such form, and be supported by such proofs, to be prescribed by the Secretary of the Treasury, as will, in his judgment, best enforce the provisions of this section, and show its operation and effect: *Provided, also*, That any salary or compensation due for the year one thousand eight hundred and thirty-five shall not be affected by this section: *Provided, however*, That in the event of any act being passed by Congress at the present session to regulate and fix the salaries or compensation of the respective officers of the customs, then this section shall operate and extend to the time such act goes into effect, and no longer."—(5 Stat. at Large, pp. 113, 114, ch. 353, § 3.)

The second section of the act approved March 3, A. D. 1837, is the same as the section last quoted, except that "thirty-seven" is substituted for "thirty-six" in the enacting clause, and it does not contain a repealing clause, or the third proviso of the section last quoted, but does contain the following additional proviso: "*Provided, however*, That the Secretary of the Treasury be authorized to extend to the collectors at such other ports, where a surplus of emoluments have been accounted for and paid into the treasury in the year eighteen hundred and thirty-two, the privilege granted to the collector of New York, to take effect from the first day of January last."—(5 Stat. at Large, p. 175, ch. 33, § 2.)

By the act approved July 7, A. D. 1838, it was enacted "that the Secretary of the Treasury be, and he is hereby, authorized to pay to the collectors, deputy collectors, naval officers, surveyors, and their respective clerks, together with the weighers, gaugers, measurers, and markers of the several ports of the United States, out of any money in the treasury not otherwise appropriated, such sums as will give to the said officers, respectively, the same compensation in the year one thousand eight hundred and thirty-eight, according to the importations of that year, as they would have been entitled to receive if the act of the fourteenth of July, one thousand eight hundred and thirty-two, had gone into effect; *Provided*, That no officer shall receive under this act a greater annual salary or compensation than was paid to such officer for the year one thousand eight hundred and thirty-two; and that in no case shall the compensation of any other officers than collectors, naval officers, surveyors, and clerks, whether by salaries, fees, or otherwise, exceed the sum of fifteen hundred dollars each per annum; nor shall the union of any two or more of those officers in one person entitle him to receive more than that sum per annum: *Provided, further*, That the said collectors, naval officers, and surveyors shall render an account quarterly to the treasury; and the other officers herein named or referred to shall render an account quarterly to the respective collectors of the customs where they are

employed, to be fowarded to the treasury, of all the fees and emoluments whatever by them, respectively, received, and of all expenses incidental to their respective offices; which accounts shall be rendered on oath or affirmation, and shall be in such form, and supported by such proofs, to be prescribed by the Secretary of the Treasury, as will, in his judgment, best enforce the provisions of this section, and show its operation and effect: *Provided, also,* That in the event of any act being passed by Congress at the present session, to regulate and fix sala[ries] or compensation of the respective officers of the customs, then this section shall operate and extend to the time such act goes into effect, and no longer: *Provided, however,* That the Secretary of the Treasury be authorized to extend to the collectors at such other ports, where a surplus of emoluments have been accounted for and paid into the treasury in the year eighteen hundred and thirty-two, the privilege granted to the collector of New York, to take effect from the first day of January last: *Provided, nevertheless,* That no collector shall receive more than four thousand dollars, and no naval officer shall receive more than three thousand dollars, and no surveyor shall receive more than twenty-five hundred dollars per annum."—(5 Stat. at Large, pp. 264, 265, chap. 169, § 3.)

By the act approved July 21, A. D. 1840, it was enacted "that the third section of the act of July seven, eighteen hundred and thirty-eight, entitled 'An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes,' be, and the same is hereby, revived and continued in force for the year eighteen hundred and forty, and until otherwise directed by law."—(6 Stat. at Large, p. 815, chap. 99, § 7.) The section thus revived and continued in force is the section quoted in the next preceding paragraph.

By the act approved March 3, A. D. 1841, it was enacted "that the Secretary of the Treasury be, and he is hereby, authorized to pay, out of any money in the treasury not otherwise appropriated, to the collectors, deputy collectors, naval officers, surveyors, and their respective clerks, together with the weighers, gaugers, measurers, and markers of the several ports of the United States, the same compensation for the year eighteen hundred and thirty-nine which they would have been entitled to receive if the third section of the act of July, eighteen hundred and thirty-eight, entitled 'An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes,' had continued in force during the said year, and subject to the provisions and restrictions therein contained: *Provided,* That nothing in this section contained shall be so construed as to give to any collector of the customs a salary for the year eighteen hundred and thirty-nine beyond the maximum now fixed by law, of four thousand dollars."—(5 Stat. at Large, p. 431, chap. 35, § 2.)

These, it is believed, are all the statutory provisions which relate to this case, except the tariff acts of 1842 and 1846.

The counsel for the petitioner, in their brief, suggest that the law which determines "the maximum now fixed by law," mentioned in the proviso last quoted, is the 9th section of the act of 1822.—(3 Stat

at Large, p. 695.) This suggestion ismanifestly erroneous. The 9th section of that act limits the emoluments of the collector at either of the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, to four thousand dollars; but the 10th section thereof limits the emoluments of any other collector to three thousand dollars.—(Ibid., p. 695.) A general *maximum* of four thousand dollars was therefore not fixed by the act of 1822; and, consequently, the act of 1822 could not have been the act referred to in the proviso to the second section of the act of March 3, A. D. 1841, the *proviso* last above quoted.

The Commissioner of Customs, in his letter to the Secretary of the Treasury, of the 20th day of November, A. D. 1852, makes the following statement: "I find, upon reference to the published statements of the compensation of the officers referred to, whose compensation was limited to $1,500 per annum by the act of 7th July, 1838, that it exceeded that sum at the port of New York, reaching, in two cases, in 1833, the sums of $3,839 97 and $4,331 57; and in 1839, when there was no limitation, ranging as high as $3,870 15 in one case, and above $3,000 in several others."—(See the pamphlet already noticed, p. 10, H. Doc. 27.)

The petitioner's is one of a class of claims amounting, in the aggregate, to the sum of $1,250,000.—(See the letter of the acting Commissioner of Customs to the Secretary of the Treasury, of the 15th day of January, A. D. 1853, pamphlet, p. 16, H. Doc. 27.*)

The petitioner insists—

1. That the act of 1840, which revived and continued in force the act of 1838 for the year 1840, "and until otherwise directed by law," operated only in those cases in which the compensation of the several officers therein referred to fell short of the compensation which they respectively would have received if the act of 1832 had not gone into effect; and

2. That the tariff act of 1842 repealed the tariff act of 1832, and thereby repealed the act of 1840.

Before the passage of the act of March 2, A. D. 1833, (ch. 54, § 3,) the laws regulating the compensation of the officers therein named were the acts of 1799 and 1816. The official services of those officers depended on the laws imposing duties on imports; but the latter had no other connexion with the former laws. The relation between them was merely accidental. At that time a weigher, for official services rendered by him under the laws imposing duties on imports, received compensation in the fees prescribed by the acts of 1797 and 1816, and it was paid to him monthly by the collector.

The act of March 2, A. D. 1833, (ch. 54, § 3,) modified the acts of 1799 and 1816. It required the *Secretary of the Treasury* to pay a weigher such sums as would give him the same compensation in the year 1833, according to the importations of that year, as he would have been entitled to receive if the act of July 14, A. D. 1832, had not gone into effect. Under that act, the collector was not the officer,

*The whole class, it is said, amount *now* to between $5,000,000 and $6,000,000.

nor the revenue in the collector's hands the fund out of which he was to be paid; but the Secretary of the Treasury was made the paying officer, and the money in the treasury, not otherwise appropriated, the fund out of which the payments were to be made. Nor was the weigher to receive the fees allowed by the acts of 1799 and 1816, but such sums as would be equivalent to what he would have received in such fees if the act of 1832 had not gone into effect; and the payments were to be made monthly as before. In a word, his *compensation* was to be the same in all respects as he would have been entitled to receive if the laws imposing duties on imports, in force immediately before the act of February 14, A. D. 1832, went into effect, had continued in force, and that act had not gone into effect.

Such, it seems to us, is the true construction of the act of March 2, A. D. 1833, (ch. 54, § 3.) Under it a weigher was not to receive fees for services actually rendered by him under the tariff act of 1832. This, for some reason, was not regarded as a just standard of compensation. As, therefore, a different standard was adopted, and his compensation was to depend, not upon the services to be actually rendered by him, but upon the services which he would have rendered if the tariff act of 1832 had not gone into effect, it was deemed proper that it should be paid, not by the collector out of the revenue in his hands, but by the Secretary of the Treasury, out of any money in the treasury not otherwise appropriated. That the Secretary of the Treasury was, in 1833, to pay a weigher his whole compensation, is, we think, clear from the language of the act. The Secretary was to pay him such sums as would give him—not make up to him, in case the fees received by him for services actually rendered should fall short of it—but such sums as would, in themselves, give him the same compensation as he would have received if the act of July 14, A. D. 1832, had not gone into effect. The sums which constitute a weigher's compensation were, indubitably, his compensation; and such sums, by the plain words of the act, were to be paid him by the Secretary of the Treasury. *The sums so paid* were, in the language of the act, to give him the same compensation which he would have been entitled to receive if the tariff act of 1832 had not gone into effect. Hence, we say that *those sums, in themselves*, constituted that compensation.

It is not pretended that a weigher, in 1833, was entitled to the fees prescribed by the acts of 1799 and 1816 for the services which he actually rendered; *and, in addition thereto*, such sums as would be equivalent to what he would have received if the act of 1832 had not gone into effect. The pretension is, that he was to receive his fees from the collector, for services actually rendered, as if the act of 1833 (ch. 54, § 3) had not been passed; and then, if they fell short of what he would have received if the act of 1832 had not gone into effect, the deficiency was to be paid by the Secretary of the Treasury. This construction produces the strange anomaly of two standards of compensation for the same class of officers, and complicates the system. It seems to us to be wholly unsustained, either by the language or the reason of the act.

The tariff act of 1832 was doubtless passed without any reference to the compensation of custom-house officers. After its passage, but

before it went into effect, it was, for reasons satisfactory to the legislature, determined that, for the year 1833, it should not stand in the same relation to the acts of 1799 and 1816, as the tariff laws in force immediately before it went into effect had stood; but that *quoad* the compensation of custom-house officers, those tariff laws should be considered as still in force, and the tariff act of 1832 not in force. In determining, therefore, the amount of compensation due in any particular case, it became the duty of the Secretary of the Treasury to look at the importations of the year 1833, and from them and the acts of 1799 and 1816 ascertain what would have been the officer's compensation if the tariff act of 1832 had not gone into effect. In doing this, in the case of a weigher, he would of course be obliged to consider what quantities of merchandise such weigher would have weighed if the tariff laws in force, immediately before the tariff law of 1832 went into effect, had still continued in force, and then to allow him the fees therefor prescribed by the acts of 1799 and 1816. This was the process by which his compensation was ascertained; and the effect was, that he received the same compensation in the year 1833, according to the importations of that year, as he would have been entitled to receive if the act of July 14, A. D. 1832 had not gone into effect.

The enacting clause of the act of June 27, A. D. 1834, was, as regards the case now under consideration, the same as the act of March 2, A. D. 1833, (ch. 54, § 3.) It had then been ascertained that, under the act of 1833, the compensation of one officer, belonging to the same class with the petitioner, had amounted to $3,839 97, and of another, to the sum of $4,331 57. The operation of the act of 1833, doubtless, suggested the *provisoes* in the act of 1834.

If our construction of the act of 1833 be correct, it applies equally to the enacting clause of the act of 1834, and leaves no room for doubt as to the proper construction of the *provisoes* in the latter act. The only cause of doubt in regard to the construction of the *provisoes* has arisen from the idea, that, upon the passage of the act of 1833, there were two systems of laws, if we may so speak, regulating the compensation of custom-house officers: first, the acts of 1799 and 1816, in connexion with the tariff act of 1832; and, second, the acts of 1799 and 1816, in connexion with the tariff acts in force immediately before the tariff act of 1832 went into effect. But we have shown, we think, that the latter was the only system then in force. If this be true, then it is plain that the language "that in no case shall the compensation of any other officers than collectors, naval officers, and surveyors, whether by salaries, fees, or otherwise, exceed the sum of two thousand dollars per annum," understood in its broadest and most comprehensive sense, will not extend beyond the purview of the enacting clause. Even when so understood, it will come within the rule, which declares that the legitimate use of a *proviso* is to take special cases out of the general enactments, and provide specially for them.—(Dwarris, 514.)

But much stress has been laid in argument on the terms "under this act," as they are used in the second *proviso* of the act of 1834. It was assumed that there were two systems of compensation laws, and then it was insisted that the terms "under this act" applied as well

to the first as to the second *proviso*. In proof of this, attention has been called to the fact that the matter embraced by the first two *provisoes* in the act of 1834 is contained in one *proviso*, and its collocation changed in the act of 1835, and all the subsequent acts. In the act of 1835, and all the subsequent acts, it is as follows: "*Provided*, That no officer shall receive *under this act* a greater annual salary or compensation than was paid to such officer for the year one thousand eight hundred and thirty-two; *and that in no case* shall the compensation of any other officers than collectors, appraisers, and surveyors, whether by salaries, fees, or otherwise, exceed the sum of fifteen hundred dollars each per annum." It will be observed, however, that the whole value of this argument rests upon the assumption that there were two systems of compensation laws; for, otherwise, it presents no point of any practical moment. The object of it was to show that the limitation was to be confined to the compensation given by one system, to wit, the system established by "this act," and did not apply to the other. But if there was but one system, and that system the one created by "*this act*," then the argument is without force. We have shown, we think, that there was but one system.

In the view which we take of these acts, the words "*under this act*" were used merely to give emphasis to the *proviso*. So understanding it, it is not material to consider whether they apply to the first as well as to the second *proviso* of the act of 1834, or to each clause of the first *proviso* in the act of 1835. According to our construction, they mean nothing more than "according to the true intent and meaning of this act"—language often used in statutes to give emphasis to other language to which it applies.

The practical operation, then, of the act of 1834, in the case of a weigher, was, that it gave him the same compensation in the year 1834, according to the importations of that year, as he would have been entitled to receive if the tariff act of 1832 had not gone into effect, unless such compensation exceeded $2,000, or the compensation paid him in 1832; if it exceeded $2,000, and that sum did not exceed the compensation paid him for the year 1832, then it gave him $2,000; but if $2,000 exceeded the compensation paid him for the year 1832, then it gave him the latter compensation.

The acts of 1835, 1836, 1837, and 1838 were, as regards this case, the same as the act of 1834, except that the maximum compensation in those acts was $1,500. The act of 1840 revived and continued in force the act of 1838 for the year 1840, "and until otherwise directed by law." All these acts, therefore, are subject to the same construction as the act of 1834, except as regards the maximum compensation In all the acts subsequent to 1834 the maximum is $1,500, instead of $2,000.

We suppose that if it be true that the act of 1835, together with the tariff acts in force immediately before the tariff act of 1832 went into effect, constituted the entire system of compensation laws for the year 1835, then there can be no question that our construction of the *provisoes* in that act is correct. It is only when it is assumed that there were two systems, that the least reason can be suggested for the application of the *provisoes* to one of them only. But even if the

assumption that there were two systems be well founded, still it does not follow that the provision limiting the compensation of a weigher to $1,500 is applicable to one of them only. It seems to us that the terms of limitation are so broad and comprehensive as necessarily to exclude a higher compensation under any circumstances.

It is doubtless a *general* rule in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, the *proviso* is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms.—(United States *vs.* Dickson, 15 Peters R., 165.) The office of a *proviso*, *generally*, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.—(Minis *vs.* the United States, 15 Peters R., 423, 445.) Such, certainly, is the general rule. But even upon the hypothesis that the construction put upon the enacting clause of the act of 1835 by the petitioner is correct, still even this rule does not justify his construction of the *proviso*. His construction of the enacting clause is, that it merely provides *additional* compensation, the compensation to which it is additional being provided by other statutes. But if this be true, then the enacting clause in question is not *general*, either in its language or its objects. The general provisions are found in the other statutes, to which the act of 1835 is subsidiary; and all of them being statutes *in pari materia*, must be construed together as constituting one system. In construing the act of 1835, then, we must consider it with reference to the previous acts. When so considered, all difficulty with regard to the *proviso* disappears, and the propriety of understanding the broad language of the limitation created by it, in its literal sense, at once becomes manifest

But rules for the construction of statutes can do no more than merely aid us in ascertaining their true intent and meaning. Hence, such rules can only be general in their character, and must, in all cases, yield to express words and plain declarations. When the words are clear and precise, there is no room for construction. It is not allowable to interpret what has no need of interpretation. Such, in our opinion, is the case in the present instance. But if there be any room for doubt, it vanishes when we take into consideration that the act of 1833, the first in the series, was passed without any *proviso*, and that the *proviso* under consideration was inserted in the next act after it had been ascertained that, under the act of 1833, one of the class of officers to whom it was applied received the sum of $3,839 37, and another $4,331 57.

But there is another view of this subject which, it seems to us, is entirely conclusive. The construction which these statutes have uniformly received at the Treasury Department has been, that they exclude any higher compensation to the officers, respectively, of the class to which the petitioner belonged, than $1,500 a year. This is not the case of one act of Congress, which, from the time of its enactment, has uniformly received a particular construction at the Treasury Department. If it were, the question would be a wholly different one

as to the value to be attached to the action of that department.—(United States *vs.* Dickson, 15 Peters R., 141, 161.) But here is a series of acts, beginning in 1833 and ending in 1841. Each one was enacted for one year only, till we come to the act of 1840, which revived the act of 1838, and continued it in force for the year 1840, and "until otherwise directed by law." The act of 1841 merely applied the act of 1838 to the year 1839. In each *proviso* the same language is used, and each *proviso* received the same construction at the Treasury Department. That the Treasury Department had adopted this construction was known to Congress from the beginning. It was received on all hands as the correct construction, and no doubt as to its correctness was ever even suggested till long after the date of the last enactment. Can it be possible that a construction thus sanctioned can now be declared to have been erroneous? Technical terms used in a statute are to be understood in their technical sense. If a statute use a word, the meaning of which is established at common law, the common law meaning is given to it. Words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense.—(Bac. Ab., title, Statute, I.) No one has ever questioned the soundness of these rules. The principle on which they are founded applies to the case now before us. Congress was called upon to pass a law giving compensation to a particular class of officers. The law was passed for one year only. It received a particular construction, under which the compensation was paid and received. With a knowledge of this, Congress passed the same law, in the same terms, for the next year, and then for the next, and so on for several successive years. Each law received the same construction, and no complaint, no suggestion of error, was made from any quarter. We cannot resist the conclusion, that Congress in again and again adopting language, the meaning of which had been thus ascertained, meant also to adopt the construction which had been applied to it. "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature."—(Per Trimble, J., in Edward's Lessee *vs.* Darby, 12 Wheat. R., 206, 210.)

We are sustained, we think, in the conclusions at which we have arrived, by the decision of the Supreme Court in the case of Hoyt *vs.* The United States.—(10 How. R., 109, 136-7.)

We do not deem it necessary to inquire whether the tariff act of 1842 repealed the tariff act of 1832; for even if it did, we do not think that the effect was to repeal the act of 1840. The act of 1840 made the acts of 1799 and 1816, in connexion with the tariff acts in force immediately before the tariff act of 1832 went into effect, the compensation laws for the officers therein named, until it should be otherwise directed by law. The repeal, therefore, of the act of 1832, and the enactment of another tariff law of a different character, could no more operate as a repeal of the act of 1840, than of any other act

on the statute book. If the act of 1842 repealed the act of 1832, it repealed a law which was in no way connected with the compensation laws, and it did not in and of itself, from its very nature, become a part of the compensation laws. To make it a part of those laws, it was necessary that it should be something more than a mere act imposing duties on imports.

We have no doubt that the reason why the act of 1833 was passed was, that the acts of 1799 and 1816, in connexion with the act of 1832, would not give a just compensation to the officers named in the act of 1833. In this sense, the act of 1832 was the *cause* of the passage of the act of 1833, and "the soul and reason" of that act. It operated, too, in connexion with other considerations, in *causing* the passage of the act of 1840. But whatever may have been the *cause*, the effect was the enactment of that statute; and it could only be repealed by a subsequent statute containing express words of repeal, or provisions irreconcileably repugnant to it. The act of 1842 contained no such words or provisions.

We fully recognize the maxim, *cessante ratione, cessat et ipsa lex.* But it is, as applied to statutes, a rule of construction, and nothing more. Its effect, in that respect, sometimes, is to show that the meaning of a statute is less comprehensive than its words.—(1 Blk. Com., 61; 2 Ruth. In., ch. 7, § 12.) No instance, we think, can be found in which it had the effect claimed for it by the petitioner.

We are of the opinion that the petitioner is not entitled to relief.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 67.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 17, 1857.—Received from the Court of Claims and referred to the Committe on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

EGLESTON & BATTELL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief under rule 20 of the Court.
3. Claimant's brief on the protest.
4. Solicitor's brief on the same point.
5. Depositions offered by the claimant, transmitted to the House of Representatives.
6. Certified copy of circular from the Treasury Department, transmitted to the House of Representatives.
7. Opinion of the Court of Claims.
8. Dissenting opinion of Judge Blackford.
9. Bill for relief of claimant.

By order of the Court of Claims.

[L. S.] In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this day of A. D. 185 .

Chief Clerk Court of Claims.

COURT OF CLAIMS.

THOMAS EGLESTON and JOSEPH BATTELL. *Claim* for excess of duties exacted on iron imported into New York in 1849.

To the honorable the Court of Claims:

The petition of Thomas Egleston and Joseph Battell, of the city of New York, merchants, importers, and dealers in iron, doing business under the name and firm of Egleston & Battell, respectfully represents, that they have a claim against the treasury of the United States for duties and penalties illegally exacted on certain importations of iron, imported from Liverpool into the port of New York, in the

months of April and May, A. D. 1849, by the ships Emperor, Henry Clay, Oxford, Marmion, and Lemuel Dyer, which said importations were severally entered for duty, according to law, at the collector's office, in the port of New York; and on entry of the same, your petitioners paid, or deposited certain sums of money to and with the collector of the customs to pay the duties by law imposed upon said imports.

Your petitioners further say, that the iron imported and entered by their said firm so as aforesaid, was actually purchased by their said firm for importation into the United States; that the said iron was purchased by their said firm, in the ordinary mode of bargain and sale, in the months of January and February, or March, 1849, at the prices specified in the several invoices of the same, which prices truly represented the fair market value of said iron at Liverpool at the time aforesaid, at which it was purchased at that port. And your petitioners further say, that, under the act of March 1, 1823, section fifth, (3d Statutes at Large, p. 732,) *the actual value at the time* of *purchase was made the dutiable value* of the iron imported by your petitioners so as aforesaid; and that it was upon such value, specified and set forth in the invoices and entries above mentioned, that the act of July 30, 1846, section first, schedule C, (9th Statutes at Large, p. 42,) imposed the duty of 30 per cent.

Your petitioners further say, that, between the time of the purchase of the imports mentioned, viz: January, February, or March, 1849, and the time of the shipment of the same on board of the ships above mentioned, there was a considerable rise in the value of such iron at Livetpool; and on the arrival of the said ships, and the entry of the said imports at the port of New York, the officers of the customs caused a valuation to be made of the said imports as of the value of the same *at the date of the shipment of said iron* on board of the said ships severally above mentioned, and the collector of the customs of the said port substituted the estimated value at the date of the shipment of said imports for the legal dutiable value, and required your petitioners to pay the duty on such valuation; and because, on the imports entered by the ships Emperor and Marmion, the value so substituted exceeded by more than ten per cent. the (dutiable) value declared on the entries of the same, the collector aforesaid, in addition to the duty demanded on such value, demanded a penalty of 20 per cent. on said value so substituted as aforesaid, and your petitioners were by the said collector required to pay, and did pay unto him the additional duties and penalties required in order to obtain possession of their said imports; and the several sums of money so required to be paid, and which your petitioners did pay to the collector of the customs at New York, as for duties due to the United States, over and above the duties imposed by law apon their said imports, together with the penalties above mentioned amounting to the sum of eleven hundred and fifty-eight $\frac{40}{100}$ dollars or thereabouts, a statement of which is hereto annexed.

Your petitioners further say, that no part of the said additional duties or penalties has been at any time refunded unto them, and their claim to have the same refunded, and right to receive the same has not been alienated by assignment or operation of law.

Your petitioners further say, they have reason to believe, and do believe, that it was in consequence of *the rise in the value* of the iron between the time of the purchase and shipment of the imports above mentioned, and because of treasury instructions of November 26, 1846, and July 6, 1847, which required the officers of the customs to estimate the duties on imports upon the value of the same at *the time of shipment*, that the before mentioned several sums of money, amounting to $1,158 40, were exacted of your petitioners by the collector of the customs at New York.

Your petitioners further say, that in November, 1849, or thereabouts, their attorney, James Humphreys, esq., in behalf of your petitioners, instituted a suit in the United States circuit court for the southern district of New York, against Cornelius W. Lawrence, the then collector of the customs for the port of New York, for the purpose of recovering the excess of duties and penalties exacted on your petitioners' aforesaid importations of iron. That afterwards, as your petitioners are informed, suits were determined, in which it was decided, by the Supreme Court of the United States, that the duties imposed by the act of July 30, 1846, were to be estimated upon the value of the imports, if procured, as of the date when procured, and if purchased, on the value of the same at the date when purchased, (P. Greely, Jr., *ads.* Thompson *et al.*, 10 Howard's Reports, 225, and Maxwell *ads.* Griswold, 10 Howard, 243,) and the Treasury Department acquiesced in those decisions, and by treasury instructions, under date of June 11, 1851, provided for refunding on claims for duties exacted in excess in cases such as this of your petitioners, and duties so exacted were refunded to various claimants.

Afterwards, in August, 1853, as your petitioners are informed, application in their behalf was made to the collector of the customs at New York, requesting him to certify for the amount claimed, in behalf of your petitioners, under treasury instructions of June 11, 1851, aforesaid, on their several importations of iron aforesaid; and again, on or about the 24th of September, 1853, application was made in their behalf to the Treasury Department, requesting said department to instruct the collector of the customs at New York to certify to the claim of your petitioners, under the instructions of June 11, 1851, aforesaid, for a return of duties claimed on their said several importations of iron aforesaid; and the department, in answer thereto, on or about the 9th of November, 1853, by letter instructed the collector at New York to certify to their claim aforesaid, if, on consultation with the United States district attorney, he should deem it advisable; and James Humphrey, esq., attorney for your petitioners, discontinued the suit above mentioned, instituted by him in behalf of your petitioners against the collector.

Your petitioners further say, that, as they are informed, the collector of the customs at New York declined to certify, and still declines to certify, to the claim presented in their behalf for a return of duties and penalties illegally exacted on their said several importations of iron, and alleges, as the reason for so doing, "the protest is insufficient," referring to the protest made by your petitioners on their entries severally.

Your petitioners further say, that the before mentioned sum of eleven hundred and fifty-eight dollars and forty cents ($1,158 40) was paid to the collector aforesaid for the use of the treasury of the United States, and the same was by the said collector accounted for and paid over to the treasury of the United States.

Wherefore, your petitioners, relying upon the justice of their claim, and the provision in *the Constitution of the United States*, which provides that private property shall not be taken for public use without just compensation, (1 Statutes at Large, p. 21,) humbly pray this honorable Court to grant such relief by a bill in favor of your petitioners, as may be in the judgment of your honorable Court suitable and necessary, in order that said sum of eleven hundred and fifty-eight dollars and forty cents may be refunded with interest on the same from the day of payment.

EGLESTON & BATTELL.

NEW YORK, *June* 22, 1855.

STATE OF NEW YORK, }
City of New York, } *ss.*

Joseph Battell being sworn, says he is one of the firm of Egleston & Battell; that he has read the foregoing petition, and that the facts stated in the petition are true, to the best of his knowledge and belief.

JOSEPH BATTELL.

Sworn to before me this 22d day of June, 1855.

GEO. H. MORTON,
U. S. Com'r, Southern District of New York.

Statement of excess of duty exacted on iron, appraised with reference to market value at the time of shipment, instead of time of purchase, imported by Egleston & Battell, owners.

Date of entry.	Name of vessel.	Where from.	Market value at Liverpool.		Difference in value.	Rate of duty.	Duty & penalty claimed.
			At time of shipment.	At time of purchase.			
1849.							
April...	Emperor.....	Liverpool.	$2,392	$2,171	$221	30 per ct.	$66 30
	Emperor.....	.....	penalty on 2,392	.....	.....	20 per ct.	478 40
	Henry Clay..	Liverpool.	1,384	1,312	72	30 per ct.	21 60
May....	Oxford.....	Liverpool.	2,088	1,908	180	30 per ct.	54 00
	Marmion.....	Liverpool.	2,143	1,934	209	30 per ct.	62 70
	Marmion.....	.....	penalty on 2,143	.....	.....	20 per ct.	428 60
	Lemuel Dyer.	Liverpool.	1,528	1,372	156	30 per ct.	46 80
1855.	Excess of duty and penalty claimed.....						1,158 40
June 22	Add interest at 6 per cent. to this date.....						422 00
	Total claimed.....						1,580 40

EGLESTON & BATTELL.

CHA. E. SHERMAN, *Attorney.*

IN THE UNITED STATES COURT OF CLAIMS.

THOMAS EGLESTON & JOSEPH BATTELL
vs.
THE UNITED STATES.
No. 51.

Brief of legal points and authorities, according to Rule 20.

The facts of this case are sufficiently set forth in the petition.

1st. By the act "regulating the collection of duties on imports," &c., approved the 1st March, 1823, section 5, and sections generally, it was provided that the *ad valorem* rates of duty upon goods, wares and merchandise * * * shall be estimated * * * upon the actual cost, if the same shall have been actually purchased.—(3 Stat. at Large, 729, 732.)

2d. The sixteenth section of the act of March 1, 1823, (3 Stat. at Large, 729,) and the sixteenth section of the act of August 30, 1842, (5 Stat. at Large, 565,) provide for an appraisement of imports, and that the value of goods purchased shall be ascertained as of the date when the same were purchased.

3d. The act of July 30, 1846, section 1, schedule C, imposed a duty of thirty per cent. on iron, (the imports mentioned in the petition,) (9 Stat. at Large, 42.)

4th. By the act of July 30, 1846, (above cited,) section eight, there was imposed a penal or addition duty of twenty per cent. in case the appraised value (*as of the date of the purchase*) should exceed by ten per cent. or more the value specified on the invoice and entry.

The acts above cited were in force when the imports in question were imported, and should have governed the collector in assessing the duties on the same.

In behalf of the petitioners it will be contended, on the case shown in the petition, and also in the depositions, that the collector erred:

I. In that he substituted an arbitrary and illegal value, whereon to estimate the duties for the dutiable value prescribed by law, (viz: the value when shipped.)

See act of 1823, sections five and sixteen, (3 Stat. at Large, 729;) act of 1842, section sixteen, (5 Stat. at Large, 565;) Thompson *et el vs.* Greely, (10 Howard, 225;) also Griswold *vs.* Maxwell, (10 Howard, 243;) and authorities therein cited.

II. In that he exacted a duty upon the enhanced value so substituted, whereby he collected more duty than was imposed by law.—(Dwarris on Stats., 735, 736, 737.)

III. In that he exacted a penal duty of twenty per cent. for a variation in value, between the value specified on the invoice at the time when purchased and the value by him assumed as of the date of the shipment of the iron, there having been a considerable rise in the value of the iron between the time of purchase and shipment.—(Thompson *vs.* Greely, 10 Howard, 225; Griswold *vs.* Maxwell, 10 Howard, 243; Sch. Enterprise, Paine's C. C. R. 32; 651 Chests Tea, ditto 499.)

The excess of duty and penalty compulsorily and illegally exacted, the payment whereof was resisted and protested against, amounted to $1,158 40, which was paid into the treasury of the United States.

The money so exacted, and paid into the treasury, may be recovered before this Court, because the said money was obtained without law, and contrary to the acts imposing duties and for the collection of the revenue.—(2 Greenleaf on Evd., 112, article 123; Chitty on Contracts, 490, 491; Story on Contracts, sec. 100; 9 Johnson, 201; United States *vs.* Lyman, 1 Mason, 482, 504.)

CHAS. E. SHERMAN,
JOHN ELY,
Attorneys for Petitioners.

COURT OF CLAIMS.

THOMAS EGLESTON and JOSEPH BATTELL *vs.* THE UNITED STATES. } Petitioner's brief on protest.

Act of 1839 requires duties to be placed to the credi of the Treasurer of the United States.—(Stat. at Large, vol. 5, pp. 348 and 349.)

Decided that no action would lie against the collector for return of duties.—(Cary *vs.* Curtis, 3 Howard, 236.)

To obviate the effect of such decision this act was passed; it restored the right of action against the collector.—(Act of 1845, 5 Stat. at Large, 349.)

Previous to 1845 no written protest was necessary; a verbal protest was sufficient.—(Gihon *vs.* Swartwout, 3 Howard, 310.)

To effect the remedy provided in the act of 1845, viz: to maintain a suit, &c., that act ought to receive the most liberal construction, it being a remedial statute.

It requires protest to be in writing, which before was not necessary, and that is substantially the whole difference. This act was not to perplex and embarrass merchants, but simply to restore a remedy which had been taken away by a decision of the Court.

Pierre Reggio *et al. vs.* Greely, collector, June 14, 1851.—Per Woodbury, J.: "The party must, in his protest, set forth facts generally, because collector might change and correct his action or error, if pointed out. But it may be general, and that is sufficient." The protest on entry was as follows: "We hereby protest against the exaction of additional duty on this entry, believing that the cost stated in the invoice is the true value of the goods, and that there is no market price of sponges at Smyrna.

"REGGIO & NEWELL."

Thompson *et al. vs.* Greely, collector, 10 Howard.—The form of the protest on the entry was: "Boston, May 30, 1849. We protest against the extra duty and penalty assessed on this entry, and claim the right of further appeal.

"WM. F. WELD & CO."

Vincent Duportu *vs.* Morton, collector, per Woodbury, J.—In this case the protest, by one of the consignees, was in the following form: "I hereby protest against paying the extra appraisement and penalty exacted upon this entry. Boston, February 15, 1849.

"WM. C. FAY."

The form of the other consignee in the same suit was as follows:

"The amount of duties paid, to the amount of seven hundred and thirty-two dollars and seventy cents ($732 70,) is paid under protest, with the intention of reclaiming the same from the United States.

"DANIEL SHARP, Jr., & CO."

Circular of May 15, 1845, enjoins it upon the collector to make the importers "*fully aware of the requirements of the act in relation to protests.*"

If our protest does not meet the requirements of the act it is the fault of the collector; he has neglected his duty, and is estopped from taking advantage of it. The cashier has examined and checked the protest—approved it.

Rule of law.—Instruments are to be construed so as to give validity and effect to the intent of the parties, and their intent is to be gathered from the consideration of the entire instrument.—(Chitty on Contracts, 83.)

If the protest, standing alone, is not sufficient, it must be taken in connexion with the invoice, entry, and all other papers to which *it relates*, as a part of the *res-gesta*, to explain and give it effect, agreeable to the rules of evidence.—(1 Howard, 169, Bell *vs.* Bruen; 5 Pickering, 395, Hunt *vs.* Livermore; 13 Peters, 99, Bradley *vs.* S. B. company; 10 Pickering, 302, Makepeace *vs.* H. college; 1 Greenleaf on Evidence, Boston ed., secs. 283, 288, 295; Starkie on Evidence, by Metcalf & Ingraham, part 1, pp. 46, 47, 48, secs. 28, 29, 30.)

A protest *in writing, of any kind*, if the government admit it as a protest, is sufficient. Here they have admitted it, and signed it; checked it off and noted it as a protest, and were paid the money under it, which is also admitted—see "W. J." signed to the protest. If not good, it is a fraud upon the importer. (Applies to protest by Thompson, Quick & M.)

The Court will not suppose the protest good for nothing when both parties have acquiesced in it and acted under it; and it does not lie with the defendants after this to gainsay it.

Duportu *vs.* Morton, collector, June 1, 1851.—Per Woodbury, J.: "Shall put it to the jury, if contested, was the protest waived by the officer? Protest is made for the benefit of the officer; he had the right *to waive it*, and, *if so*, he is bound by it, no rule to the contrary in courts of law, but in all honor and fairness he is bound by it. Under the circumstances, did not the collector waive any further form or sufficiency of protest? This Court would not allow a merchant to be tripped up by an objection which was then waived."

"I know something of these protests to disembarrass the accounts of collector, and to advise him of grounds, and for his benefit they are made; we must take all parts of the paper together that relate to the subject.''

Reggio *vs.* Greely, collector.—By Woodbury, J.: "The defendants had contended it was the duty of the importer to state his exceptions, *if he had any, to the manner of the proceedings of appraisers.* There was nothing of that kind required of the importer by law. He has stated what he considers the true value. He does not want them appraised for his satisfaction. It is the collector who requires them to be appraised. That is their affair. He is not bound to ask them to take more or less number of packages. They raise the value, and he, being dissatisfied, calls for a re-appraisement by merchant appraisers."

Summary of Contestation.

Acts by merchants shown in *black ink.*

Acts by custom-house officers shown in *red ink,* or italics.

From entry:

"Entry of merchandise imported by Thompson, Quick & McIntosh in the Cambria steamer, from Liverpool, September 22, 1849:

[TA.]	255.	1 bale	woollen shawls,	200	shawls	.....	£47 17
	256.	1 "	do do	200	"	.....	47 17
	257.	1 "	do do	144	"	.....	51 13

"Value of goods entered:

£189 01 00 = $915, at 25 per cent.....$228 75
405 16 11 = 1,964, at 30 per cent.....589 20

817 95

"Paid, September 24, '49.

"*Consignee, importer, or agent's oath.*"

"That the entry now delivered to the collector contains a just and true account of the said goods, wares and merchandise, according to the said invoice and bill of lading &c., and to the best of my knowledge and belief, the invoice now produced by me exhibits the actual cost or fair market value at the time or times and place or places when and where procured."

"T. W. QUICK."

Sworn to this 24th September, 1849, before me.

TALMAN, *D. Collector.*

[From invoice]—"*Amend entry of number* 255, 256, 257, *adding as per merchants report, penalty.*

"J. S. HONE, A. C."

[On entry by C. H. officers.]

Add to 255 *a* 258, for market value £51 0 0
$915 at 25 per cent. $228,75 .....
$2,211, at 30 per cent. 663,30 .....

892,05

On 255 *a* 257 ..... £203 3
Penalty, $983, at 20 per cent ..... $196 60.—*T. S.*
Additional duty ..... 74 10.—*T. S.*
Additional duty and penalty.—Paid October 6, 1849.—*J. W. S.*

"We hereby protest against paying additional duty and penalty on [TA.] 225 a 228, being appraised too high, we claim to have $270 70 refunded, being amount paid for additional duty and penalty."

"THOMPSON QUICK & McINTOSH."

Held to be sufficient.—*W. J.*

Protest in Egleston and Battell is as follows:

"Entry of merchandise imported by Egleston & Battell in the Emperor from Liverpool, New York, April 1849.

	tns.	cwt.	qrs.	lbs.	
Forty-five hundred and six bars iron	78	9	0	6	£411 17 6
13 bars T iron		13	3	12	4 14 10
					416 12 4
C and from freight Cardiff					31 7 8
s	£12	7	·2		448 0 0
Di count.		2	4		12 9 6
					435 10 6
					10 17 9
Commissions, 2½ per cent.					2 0 10
					448 9 1
Charges					$2 170 52

$2,171, at 30 per cent, $651 30.—*J. M. K.*

"EGLESTON & BATTELL."

"*Owners oath.*"

"I, Joseph Battell, do solemnly and truly swear that the entry now delivered by me to the collector of New York, contains a just and true account of all the goods, wares and merchandise, imported by, or consigned to Egleston & Battell in the ship Emperor, whereof Brown is master, from Liverpool, that the invoice which I now produce contains a *just* and *faithful account* of the *actual cost* of the said goods, wares and merchandise, of all charges thereon. * * * And I do further solemnly and truly swear that I have not, in the said entry or invoice, concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares or merchandise; and that if, at any time hereafter, I discover any error in the said invoice or in the account now produced of the said goods, &c. &c., I will immediately make the same known to the collector of this district."

JOSEPH BATTELL.

Sworn to this 5th day of April, 1849, before me,

D. W. ALLEN, *D. Collector.*

[On invoice.] Value at Liverpool, £6 5*s*. per ton, including additions made on entry.

A. B. MEAD.
A. B. M.
C. J. WILLIS.
POMEROY.

MAY 9, 1849.
Amend and take penalty.—H. A. J.

		App. am't.	£.	s.	d.
[Contestation.]	78 9 0 6	£6 5*s*.	490	6	6
	11 3 12		4	14	10
			495	1	4
Discount	14 14 2		4	16	6
	2 4				
			480	4	10
Commissions, 2½ per cent			12	0	1
Charges			2	0	10
			494	5	9
			$2,392	35	

$2,392, at 30 per cent., $717 60
Penalty, 2,392, at 20 per cent., 478 40
Protest attached.—W. L. B.
Duty and penalty paid May 11.—W. L. B.

"*To the collector of New York:*

"We hereby protest against the addition made to this entry, and to the increased duties and penalty thereby exacted.

"EGLESTON & BATTELL."

"NEW YORK, *May* 11, 1849.—W. L. B."

IN THE COURT OF CLAIMS.

ON PETITION OF EGLESTON AND BATTELL.

Brief of the United States Solicitor.

The point in this case is on the sufficiency of the protests.

The importer entered his iron as of the invoice value, and there had been a rise in prices between the purchase and shipment of more than 10 per cent. The appraisers, under instructions, appraised the goods as of value of iron at the date of shipment instead as of the date of purchase, contrary to the rule established by the Supreme Court in Thompson's case in the 10 Howard, 225.

Protest was made in these words: "We hereby protest against the

additions made to the written entry, and to the increased duty and penalty thereby exacted." This is attached to the entry, and it is contended that it shows *the grounds* upon which the party objected to the pay and of the duties.

But it was decided by Judge Tanney, of the circuit court for the district of Maryland, that such a protest was not sufficient.—(See case of Mason and Tullis *vs.* Kane, (MS.) cited in the brief of Solicitor in the case of David Wood, No. 63.)

It is manifest that there is nothing in this protest under consideration which necessarily calls in question the officer's construction of the law. The increase complained of in the protest may have been caused by the appraiser's finding that the true value at the time of purchase was not set out in the invoice for anything that appears. The evidence taken, showing what was the true ground does not help the matter. Again, it is entirely compatible with the statement in the protest that the addition made to the invoice price was made, not because of any rise or variation in the market value of the article since the purchase, but because there was a difference between the value stated in the invoice and the market value at the date of the purchase.

The fact that no appeal was taken to merchant appraisers is merely argumentative. It does not follow that if the party had deemed himself aggrieved by the appraisement because the appprai ser had found the market value to be greater at the time of purchase than that stated in invoice that he would have appealed.

The case cited from MSS. opinion of Judge Woodbury, Duporteau *vs.* Morton, was a case where the judge put it to the jury to say whether, on the facts proved, that there was a waiver of protest. We have not the case before us with sufficient fullness to appreciate the extract from the opinion. We have enough, however, to see that the questions on the facts was, whether the collector *had waived protest.* There is no question of that kind here; no facts in proof at all about the circumstances of the case. It is manifest that no such could have been maintained for this claim, or plaintiff's counsel would not have dismissed the suit brought. It was also the opinion of the United States district attorney, who advised against the payment.

M. BLAIR.

IN THE COURT OF CLAIMS.

EGLESTON & BATTELL *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the month of April, A. D. eighteen hundred and forty-nine, the petitioners imported from Liverpool into the city of New York, by the Emperor, a quantity of iron, the invoice value of which, including charges, was two thousand one hundred and seventy dollars and fifty-two cents. The appraisers estimated its value at two thousand three

hundred and ninety-two dollars. The collector, thereupon, exacted a duty on the appraised value of thirty *per centum;* and the appraised value exceeding the invoice value by more than ten *per centum*, he also exacted an additional duty on the appraised value, of twenty *per centum*. The duty of thirty *per centum* on the excess of the appraised over the invoice value amounted to the sum of *sixty-six dollars and thirty cents*, and the additional duty of twenty *per centum* on the appraised value amounted to the sum of *four hundred and seventy-eight dollars and forty cents*.

In the month of May, A. D. 1849, the petitioners imported from Liverpool into the city of New York, by the Henry Clay, a further quantity of iron, the invoice value of which was thirteen hundred and twelve dollars. The appraisers estimated its value at thirteen hundred and eighty-five dollars, on which the collector exacted a duty of thirty *per centum*. The duties thus exacted on the excess of the appraised over the invoice value amounted to *twenty-one dollars and sixty cents*.

In the same month the petitioners imported from Liverpool into the city of New York, by the Oxford, a further quantity of iron, the invoice value of which was two thousand nine hundred and eight dollars and seven cents. The appraisers estimated its value at two thousand and eighty-eight dollars, on which the collector exacted a duty of thirty *per centum*. The duty thus exacted on the excess of the appraised over the invoice value amounted to *fifty-four dollars*.

In the same month, the petitioners imported from Liverpool into the city of New York, by the Marmion, a further quantity of iron, the invoice value of which, including charges, was one thousand nine hundred and thirty-four dollars and twenty-three cents. The appraisers estimated its value at two thousand one hundred and forty-three dollars and twenty-three cents. The collector thereupon exacted a duty on the appraised value of thirty *per centum;* and the appraised value exceeding the invoice value by more than ten *per centum*, he also exacted an additional duty on the appraised value of twenty *per centum*. The duty of thirty *per centum* on the excess of the appraised over the invoice value amounted to the sum of *sixty-two dollars and seventy cents;* and the additional duty of twenty *per centum* on the appraised value amounted to the sum of *four hundred and twenty-eight dollars and sixty cents*.

In the same month the petitioners imported from Liverpool into the city of New York, by the Lemuel Dyer, a further quantity of iron, the invoice value of which, including charges, was thirteen hundred and seventy-two dollars and twenty-four cents, and the petitioners, under a protest, made in writing and signed by them, against such addition, added to that value, so as to increase it to fifteen hundred and twenty-eight dollars and thirty-five cents. The collector thereupon exacted on such increased value a duty of thirty *per centum*. The duty upon the excess of the increased over the invoice value amounted to the sum of *forty-six dollars and eighty cents*.

The petitioners paid the duties thus exacted of them on each of the importations under a protest, made in writing and signed by them. A copy of each protest is annexed to the deposition of Harvey Loomis.

The whole of the iron imported as above mentioned was purchased by the petitioners for cash at Liverpool in the months of January, February, and March, A. D. 1849, at the prices stated in the invoices and entries, and those prices were the cash market value of the iron at the city of Liverpo l at the several periods when the purchases were respectively made. In the interval between the purchases and the several shipments, such iron rose in price. The appraisers, under instructions from the Secretary of the Treasury, estimated the value as of the time of shipment, and not as of the time of purchase, in every instance, except in that of the importation by the Lemuel Dyer. In that instance, the petitioners made the addition in the entry to the cost or value given in the invoice, under protest as already stated. The witness Harvey Loomis believes that the additions made to the value stated in the invoice were equal to the rise which took place in the price of iron between the time of purchase and the time of shipment. The appraisers never saw the iron. The witness A. B. Mead testifies that he was an assistant appraiser, and the officer who passed upon the value of the iron, the attestation of the other appraisers following as a matter of course. At the time that he made the certificates mentioned in his deposition he understood that the invoice represented the actual cost and price paid for the iron, and that there had been a rise in the value of iron before the shipment. He certified the value of iron at Liverpool at the time of shipment, acting "in so doing under and in pursuance of treasury instructions, which required public appraisers to certify to the value of imports as of the date when they were shipped at foreign ports for the United States."

The petitioners now claim that the duties exacted on the excess of the appraised over the invoice values, and on the amount added by themselves to the invoice value of the importation made by the Lemuel Dyer, and the penalties exacted on the appraised value of the importations made by the Emperor and the Marmion, amounting in the whole to the sum of one thousand, one hundred and fifty-eight dollars and forty cents, shall be refunded to them. They also claim interest thereon. The different payments to the United States were made between the eleventh and the sixteenth days of May, A. D. eighteen hundred and forty-nine.

The importations were made under the tariff act approved July 30, A. D. 1846, the eighth section of which makes it the duty of the collector, within whose district goods may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained in accordance with the provisions of existing laws. The laws then existing, and in force till the passage of the act approved March 3, A. D. 1851, (9 Stat. at L. 629, § 1,) required the appraisers, where the goods imported were purchased, to ascertain their value *at the time of the purchase*, not their value at the time of exportation, in the principal markets of the country from which the same were imported into the United States. They had no authority to consider the value at the time of exportation, except as a means of ascertaining the value at the time of purchase. The object of the laws then in force seems to have been to tax the importer on the amount or value he had expended.—(Per Woodbury, J., in Greely

vs. Thompson, 10 How. R., 238.) Where, therefore, the appraisers considered only the value at the time of exportation, and by their appraisement ascertained that value, and that value alone, and it was different from the value when the purchase was made, the appraisement was illegal.—(Greely *vs.* Thompson, 10 How. R., 225.)

This principle is not at all inconsistent with the doctrine, that where the appraisers act within the legitimate sphere of their duties their appraisement is final. The general principle is, that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying their validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law.—(United States *vs.* Arredondo, 6 Peters, R., 691, 729-30.) The appraisers are appointed "with powers, by all reasonable ways and means, to ascertain, estimate, and appraise the true and market value and wholesale price" of the importation. The exercise of these powers involve knowledge, judgment, and discretion. And in the event that the result should prove unsatisfactory, a mode of correction is provided by the act.—(Per Campbell, J., in Bartlett *vs.* Kane, 16 How. R., 272.) Hence, their acts within the powers given them are, under the general principle already stated, considered as final, if not appealed from.—(Bartlett *vs.* Kane, 16 How. R., 263.) But their powers are special, and can be lawfully exercised only within the limits prescribed for them. Inasmuch, therefore, as those powers were confined to the ascertainment of the value at the time of purchase, when the question is, whether the appraisers undertook to ascertain some other value different from that at the time of purchase, it is a question of "power in the officer." Such a question may properly arise, and if it be determined that the exercise of the power was confined to the value at the time of the exportation, then the act was invalid and unlawful.—(Greely *vs.* Thompson, 10 How. R., 225.)

In this case the official records of the Treasury Department show that the appraisers were required by instructions from the Secretary of the Treasury to ascertain by their appraisement the value of the imports at the time of exportation; and the twenty-fourth section of the act of Congress, approved August 30, A. D. 1842, in express terms makes it "the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws.—(5 Stat. at L., p. 566.) The appraisers must, therefore, be presumed to have obeyed the instructions of the Treasury Department, and consequently to have ascertained the value of the iron at the time of the exportation. The parol evidence in this case is direct and positive to the same effect, but whether we should be authorized to be governed by that alone, independently of the presumption arising from the recorded instruc-

tions of the Secretary of the Treasury, we do not determine. Taking the whole evidence together, the presumption arising from the instructions, aided and sustained by the direct parol evidence, we are of the opinion that it fully establishes the fact that the appraisement ascertained the value of the iron at the time of exportation, and not at the time of purchase. Such an appraisement is unlawful.—(Greely *vs.* Thompson, 10 How. 225.)

In the case of the importation by the Lemuel Dyer, the petitioners manifestly made the addition to the value stated in the invoice, in order to avoid the penal duty provided for by the 8th section of the tariff act of July 30, A. D. 1846.—(9 Stat. at L., p. 43.) The addition was made under protest, and in view of the instructions of the Secretary of the Treasury, requiring the appraisers to ascertain the value at the time of exportation. The design was to raise the value stated in the invoice to the value at the time of exportation. The petitioners not only made this addition under protest, but they also paid theduties exacted thereon under protest. The exaction of those duties was illegal.—(Maxwell *vs.* Griswold, 10 How. R., 242.)

We do not think it necessary to consider whether the protests in this case were such as are required by the act of February 26, A. D. 1845.—(5 Stat. at L., p. 727.) In the case of James Beatty's Executor *vs.* The United States, and in the case of William W. Spence and Andrew Reid *vs.* The United States, we held that the act of 1845 does not apply to a case like the present, or affect a party's right to relief in this Court. But the protests, whether they be such as are required by that act or not, abundantly show that the money, the repayment of which the petitioners are now claiming, was paid by them involuntarily. They were forced to make the payments "by the collector, *colore offici*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector. The money was thus obtained by a moral duress, not justified by law."—(Maxwell *vs.* Griswold, How. R., 256.)

We are of opinion that the petitioners are entitled to relief, and shall report to Congress a bill in their favor for the sum of one thousand one hundred and fifty-eight dollars and forty cents.

EGLESTON & BATTELL *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

This is a claim for duties alleged to have been overpaid on certain importations of iron in 1849. The ground of my dissent is, that the duties in question were paid without a legal protest in any of the cases.

In the case of the "Emperor" the protest is as follows:

"*To the Collector of New York:*

"We hereby protest against the addition made to this entry, and to the increased duties and penalty thereby exacted.

"EGLESTON & BATTELL.

"NEW YORK, *May* 11, 1849."

In the case of the "Henry Clay," the protest is as follows:

"NEW YORK, *May* 8, 1849.

"We hereby protest against the addition made to the value of the annexed invoice per 'Henry Clay,' by the appraisers, and shall claim that the excess of duties thereby exacted be refunded.

"EGLESTON & BATTELL.

"To the COLLECTOR OF THE PORT OF NEW YORK."

In the case of the "Oxford" the protest is as follows:

"*To the Collector of New York:*

"We hereby protest against the addition made to this entry, and to the increased duties thereby exacted.

"EGLESTON & BATTELL.

"NEW YORK, *May* 11, 1849."

In the case of the "Marmion" the protest is as follows:

"MAY 11, 1849.

"*To the Collector of the port of New York:*

"We hereby protest against the addition made to value of annexed invoice, and to the increased duties and penalty thereby exacted.

"EGLESTON & BATTELL."

In the case of the "Lemuel Dyer" the protest is as follows:

"*To the Collector of the port of New York:*

"We hereby protest against the addition made to original invoice value of the annexed entry per 'Lemuel Dyer,' and to the increased duties thereby exacted.

"EGLESTON & BATTELL.

"NEW YORK, *May* 15, 1849."

The act of Congress of 1845, as it relates to protests, is as follows:

"Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at Large, p. 727.)

I have heretofore endeavored to show the importance of this stant-

tory provision, and that it applies to suits in this Court against the United States, as well as to suits in the circuit courts of the United States against collectors.

In the case of Maxwell *vs.* Griswold, 10 Howard, 242, 256, cited at the conclusion of the opinion of the majority of the Court, there was a legal protest, in which the grounds of objection are distinctly and specifically set forth.

The protests now before us, and which are copied into this opinion, are all defective in not setting out specifically the grounds of objection, as the act of 1845, above cited, expressly requires. The objection now made in this Court to the appraisement is, that the value of the iron was appraised conformably to its market value at the time of exportation, instead of at the time of purchase. Neither that objection nor any other is specified in any of the protests; and they are, for that reason, all defective.

The claimant, for the foregoing reasons, is not, in my opinion, entitled to recover.—(See Lawrence *vs.* Caswell, 13 Howard, 488, 496; my dissenting opinions in Sturges, Bennett & Co. *vs.* The United States; Beatty's Executor *vs.* The United States; Spence & Reid *vs.* The United States; and Wood *vs.* The United States, 2 vol. Rep. Court of Claims, No. 36, pp. 48, 28, 50, 53.)

A BILL for the relief of Egleston & Battell, merchants of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Egleston and Battell, merchants of the city of New York, the sum of one thousand one hundred and fifty-eight dollars and forty cents, in full for excess of duties paid by them on importations of iron made by them into the port of New York in the year eighteen hundred and forty-nine.

shall report to Congress a bill in their favor for the sum of three hundred and thirty-one dollars.

WOLFE & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, and 1849. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496; the dissenting opinions in Sturges, Bennett & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's executor *vs.* The United States; and Wood *vs.* The United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Wolfe & Co., merchants, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Wolfe & Co., merchants, of the city of New York, the sum of three hundred and thirty-one dollars, in full for excess of duties paid by them on importations of brandy and gin into the port of New York in the years eighteen hundred and forty-seven, and eighteen hundred and forty-eight, and eighteen hundred and forty-nine.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 68.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN MICHEL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimant's counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from the Treasury Department and transmitted to the House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court, at Washington, this second day of February, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of John Michel, of the city of New York, to the Court of Claims:

Your petitioner respectfully represents, that during the years 1847 and 1848 he imported into the United States certain quantities of liquors

in casks, on which importation duties were imposed, and pai him to the United States, not only on the value of the quantity o liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, (9 *Howard*, 619;) The United States *vs.* Southmayd *et. al.*, (9 *Howard*, 637;) and Lawrence *vs.* Caswell *et al.*, (13 *Howard*, 488,) that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors, unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner, therefore, prays that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account, and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

J. MICHEL.

NEW YORK, *June* 23, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

John Michel, being duly sworn, deposes and say, that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

J. MICHEL.

Sworn to, this 23d day of June, A. D. 1855, before me.

J. HILLYER.

IN THE COURT OF CLAIMS.

JOHN MICHEL *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1847 and 1848 the petitioner imported into the city of New York large quantities of brandy. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties properly payable on the quantities actually imported was the sum of three hundred and eighty-one dollars.—(See the statement certified by the collector and countersigned by the naval officer of New York.) The petitioner made no protest. He does not state whether the brandy, or any part of it, was warehoused, nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the brandy, or any part of it, was or was not warehoused, is wholly immaterial; for in either event the duties on the brandy not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and shall report to Congress a bill in his favor for the sum of three hundred and eighty-one dollars.

JOHN MICHEL *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847 and 1848. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496.) The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States.—(2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of John Michel, merchant, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to John Michel, merchant, of the city of New York, the sum of three hundred and eighty-one dollars, in full for excess of duties paid by him on importations of brandy made by him into the port of New York in the years eighteen hundred and forty-seven and eighteen hundred and forty-eight.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 69.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committtee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ATKINSON, ROLLINS & CO. *vs.* THE UNITED STATES.

1. The petition of the claimant.
2 For briefs of claimant's counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to the House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Atkinson, Rollins & Co., of the city of Boston, to the Court of Claims:

Your petitioners respectfully represent, that during the years 1847-1848, 1849, 1850 and 1851, they imported into the United States certain quantities of liquors in casks, on which importations duties were

imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when the duty was imposed; which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the case of Marriott *vs.* Brune *et al.*, 9 *Howard*, 619; The United States *vs.* Southmayd *et al.*, 9 *Howard*, 637; and Lawrence *vs.* Caswell *et al.*, 13 *Howard*, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts to be made up, unless called for by the Court of Claims.

Your petitioners therefore pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

ATKINSON, ROLLINS & CO., *in liq.*

BOSTON, *September* 7, 1855.

CITY AND COUNTY OF BOSTON, *ss.*

Joel Richards, a member of the late firm of Atkinson, Rollins & Co., being duly sworn, deposes and says, that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

JOEL RICHARDS.

Sworn to this 7th day of September, A. D. 1855, before me.

EDWARD A. DEXTER,
Notary Public and Justice of the Peace.

IN THE COURT OF CLAIMS.

ATKINSON, ROLLINS & CO. *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

In the years 1847, 1848, 1849, 1850, and 1851, the petitioners imported into the city of Boston large quantities of gin. The quantities stated in the invoices exceeded the quantities ascertained by the return of the gaugers, but they were required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported, after deducting therefrom the several sums of money heretofore allowed to the petitioners, amounted to the sum of four thousand one hundred and ninety-four dollars. See the statement certified by the collector, and countersigned by the naval officer of Boston. The petitioner made no protest. He does not state whether the gin, or any part of it, was warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the gin, or any part of it, was or was not warehoused, is wholly immaterial; for in either event the duties on the gin not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioners are entitled to relief, and shall report to Congress a bill in their favor for the sum of four thousand one hundred and ninety-four dollars.

ATKINSON, ROLLINS & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion.

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, 1850, and 1851. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496. The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States. 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Atkinson, Rollins & Co., merchants of the city of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the Treasury not otherwise appropriated, to pay to Atkinson, Rollins & Co., merchants of the city of Boston, the sum of four thousand one hundred and ninety-four dollars, in full, for excess of duties paid by them on importations of gin into the port of Boston in the years eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, eighteen hundred and fifty, and eighteen hundred and fifty-one.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 70.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

LAVINIA TIPTON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

LAVINIA TIPTON *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Lavinia Tipton, of the county of White, and State of Tennessee, respectfully represents that she is the widow of Jonathan Tipton, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Jonathan Tipton subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of $300 per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 3,

shall report to Congress a bill in their favor for the sum of three hundred and thirty-one dollars.

WOLFE & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, and 1849. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496; the dissenting opinions in Sturges, Bennett & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's executor *vs.* The United States; and Wood *vs.* The United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Wolfe & Co., merchants, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Wolfe & Co., merchants, of the city of New York, the sum of three hundred and thirty-one dollars, in full for excess of duties paid by them on importations of brandy and gin into the port of New York in the years eighteen hundred and forty-seven, and eighteen hundred and forty-eight, and eighteen hundred and forty-nine.

not otherwise appropriated, to pay to Lavinia Tipton, the widow of Jonathan Tipton, deceased, an officer in the army of the revolution, the sum of one thousand four hundred and seventy-five dollars, being for the arrears of her pension, at the rate of three hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 71.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARGARET TAYLOR *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARGARET TAYLOR *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Margaret Taylor, of the country of Putnam, and State of Tennessee, respectfully represents that she is the widow of Isaac Taylor, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Isaac Taylor subsequent to the

1st day of January, 1800, and has been allowed a pension at the rate of four hundred and eighty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

MARGARET TAYLOR *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Isaac Taylor, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of four hundred and eighty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Margaret Taylor, of Putnam county, Tennessee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Margaret Taylor, the widow of Isaac Taylor, deceased, an officer in the army of the revolution, the sum of $2,360, being for the arrears of her pension, at the rate of four hundred and eighty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and ophans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 72.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WOLFE & CO. *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimants' counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal questions, see the opinion in report of David Wood.
4. Statement of amount of claim received from the Treasury Department, and transmitted to the House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Wolfe & Co., of the city of New York, to the Court of Claims.

Your petitioners respectfully represent that, during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States cer-

tain quantities of liquors in casks, on which importations duties were imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when the duty was imposed; which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the sixteenth and twenty-first sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the first section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the second section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 *Howard*, 619; The United States *vs.* Southmayd *et al.*, 9 *Howard* 637; and Lawrence *vs.* Caswell *et al.*, 13 *Howard*, 488, that according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of

the Treasury has refused to allow that such accounts be made up unless called for by the Court of Claims.

Your petitioners therefore pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

WOLFE & CO.

NEW YORK, *July* 19, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

Udolpho Wolfe, a member of the firm of Wolfe & Co., being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

UDOLPHO WOLFE.

Sworn to this nineteenth day of July, A. D. 1855, before me.

GILBERT S. NIXON,
Commissioner of Deeds.

IN THE COURT OF CLAIMS.

WOLFE & CO. *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1847, 1848, and 1849 the petitioners imported into the city of New York large quantities of brandy and gin. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but they were required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported amounts to the sum of three hundred and thirty-one dollars.—(See the statement certified by the collector, and countersigned by the naval officer of New York.) The petitioner made no protest. He does not state whether the brandy or gin, or any part of either, was warehoused, nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the brandy or gin, or any part of either, was or was not warehoused is wholly immaterial, for in either event the duties on the brandy and gin not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennett & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioners are entitled to relief, and

shall report to Congress a bill in their favor for the sum of three hundred and thirty-one dollars.

WOLFE & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD'S dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, and 1849. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496; the dissenting opinions in Sturges, Bennett & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's executor *vs.* The United States; and Wood *vs.* The United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Wolfe & Co., merchants, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Wolfe & Co., merchants, of the city of New York, the sum of three hundred and thirty-one dollars, in full for excess of duties paid by them on importations of brandy and gin into the port of New York in the years eighteen hundred and forty-seven, and eighteen hundred and forty-eight, and eighteen hundred and forty-nine.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 73.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY ROBBINS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-first day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARY ROBBINS *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mary Robbins, of the county of Westmoreland, and State of Pennsylvania, respectfully represents that she is the widow of Brintnal Robbins, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Brintnal Robbins subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of two hundred and thirteen dollars per annum, on

account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

MARY ROBBINS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Brintnal Robbins, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of two hundred and thirteen dollars and thirty-three cents per annum, commencing on the 3d of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Mary Robbins, of Westmoreland county, Pennsylvania.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Mary Robbins, the widow of Brintnal Robbins, deceased, an officer in the army of the revolution, the sum of $1,048 88, being for the arrears of her pension at the rate of $213 33 per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 74.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

GEO. W. WALES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of the claimant's counsel and United States solicitors, see report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in the report of David Wood.
4. Statement of amount of claim received from Treasury Department transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims,

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of George W. Wales, of the city of Boston, to the Court of Claims.

Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850 and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed, and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in said

casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed, which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 Howard, 619; The United States *vs.* Southmayd *et. al.*, 9 Howard, 637; and Lawrence *vs.* Caswell *et al.*, 13 Howard, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner therefore prays that the Secretary of the Treasury

be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account, and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

GEORGE W. WALES,
By his attorney, N. H. EMMONS.

BOSTON, *July* 5, 1855.

COMMONWEALTH OF MASSACHUSETTS, *City and County of Suffolk*, } *Boston, ss.*

George W. Wales, by his attorney, being duly sworn, deposes and says, that the matters and things set forth in the foregoing petition are true to the best of his knowledge and belief.

GEORGE W. WALES,
By his attorney, N. H. EMMONS.

Sworn to this fifth day of July, A. D. 1855, before me.

THOMAS A. DEXTER, [L. S.]
Public Notary and Justice of the Peace.

IN THE COURT OF CLAIMS.

GEORGE W. WALES *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court :

In the years 1847, 1848, 1849, 1850, and 1851, the petitioner imported into the city of Boston large quantities of brandy and gin. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported, after deducting therefrom the several sums of money heretofore allowed to the petitioner, amounts to the sum of three thousand three hundred and ninety-four dollars.—(See the statement certified by the collector, and countersigned by the naval officer of Boston.) The petitioner made no protest. He does not state whether the liquors, or any part of them, were warehoused ; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the liquors, or any part of them, were or were not warehoused, is wholly immaterial ; for in either event the duties on the liquors not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and shall report to Congress a bill in his favor for the sum of three thousand three hundred and ninety-four dollars.

GEORGE W. WALES *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, 1850, and 1851. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496. The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States, and Wood *vs.* The United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of George W. Wales, merchant, of the city of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to G. W. Wales, merchant, of the city of Boston, the sum of three thousand three hundred and ninety-four dollars, in full for excess of duties paid by him on importations of brandy and gin into the port of Boston, in the years eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, eighteen hundred and fifty, and eighteen hundred and fifty-one.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 75.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee of Claims and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the Honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SAMUEL A. WAY *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimant's counsel and United States solicitor, see the report in the case of David Wood.
3. For the opinion of the court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Samuel A. Way, of the city of Boston, to the Court of Claims.

Your petitioner respectfully represents: That, during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were

imposed and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, (which was lost,) which did not exist at the time the duty was imposed—which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the first section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the second section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 Howard, 619; The United States *vs.* Southmayd *et al.*, 9 Howard, 637; and Lawrence *vs.* Caswell *et al.*, 13 Howard, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that, by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner therefore prays that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account; and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

SAMUEL A. WAY.

BOSTON, *July* 25, 1855.

COMMONWEALTH OF MASSACHUSETTS, }
City of Boston and County of Suffolk, } *ss.*

S. A. Way, being duly sworn, deposes and says, that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

SAMUEL A. WAY.

Sworn to this 25th day of July, A. D. 1855, before me,
THOMAS A. DEXTER,
Notary Public and Justice of the Peace.

IN THE COURT OF CLAIMS.

SAMUEL A. WAY *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1847, 1848, 1849, 1850, and 1851, the petitioner imported into the city of Boston large quantities of brandy and gin. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties properly chargeable on the quantities actually imported, after deducting therefrom the several sums of money heretofore allowed to the petitioner, amounts to the sum of one hundred and seventy-one dollars. See the statement certified by the collector, and countersigned by the naval officer of Boston. The petitioner made no protest. He does not state whether the brandy and gin, or either, or any part of either, was warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the brandy and gin were or were not warehoused, is wholly immaterial; for in either event the duties on the brandy and gin not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that petitioner is entitled to relief, and shall

report to Congress a bill in his favor for the sum of one hundred and seventy-one dollars.

SAMUEL A. WAY *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, 1850 and 1851. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496. The dissenting opinions in Sturges, Bennett & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States. 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Samuel A. Way, merchant, of the city of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Samuel A. Way, merchant, of the city of Boston, the sum of one hundred and seventy dollars, in full for excess of duties paid by him on importations of brandy and gin made by him into the port of Boston, in the years eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, eighteen hundred and fifty and eighteen hundred and fifty-one.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 76.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

J. D. & M. WILLIAMS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimant's counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of J. D. & M. Williams, of the city of Boston, to the Court of Claims:

Your petitioners respectfully represent, that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of liquors in casks, on which importations duties were imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when

the duty was imposed; which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al*, 9 *Howard*, 619; the United States *vs.* Southmayd *et al.*, 9 *Howard*, 637; and Lawrence *vs.* Caswell *et al.*, 13 *Howard*, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up unless called for by the Court of Claims.

Your petitioners therefore pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants,

as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

JOHN D. & M. WILLIAMS,
By MOSES WILLIAMS.

COMMONWEALTH OF MASSACHUSETTS, } *ss.*
County of Suffolk, City of Boston, }

Moses Williams, esq., a member of the firm of J. D. & M. Williams, being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

MOSES WILLIAMS.

BOSTON, *July* 5, 1855.

Sworn to this fifth day of July, A. D. 1855, before me.

THOMAS A. DEXTER,
Public Notary and Justice of the Peace.

IN THE COURT OF CLAIMS.

JOHN D. & M. WILLIAMS *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

In the years 1847, 1848, 1849, 1850, and 1851, the petitioners imported into the city of Boston large quantities of brandy. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but they were required to pay, and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported, after deducting therefrom the several sums of money heretofore allowed to the petitioners, amounts to the sum of one thousand nine hundred and sixty-two dollars.—(See the statement certified by the collector, and countersigned by the naval officer of Boston.) The petitioner made no protest. He does not state whether the brandy, or any part of it, was warehoused ; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the brandy was or was not warehoused, is wholly immaterial ; for in either event the duties on the brandy not imported were illegally exacted, and paid involuntarily. We refer to our opinions in Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and shall report to Congress a bill in his favor for one thousand nine hundred and sixty-two dollars.

JOHN D. & M. WILLIAMS *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion.

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, 1850, and 1851. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496; the dissenting opinions in Sturges, Bennet & Co. *vs.* the United States; Spence & Reid *vs.* the United States; Beatty's Executor *vs.* the United States; and Wood *vs.* the United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of J. D. & M. Williams, merchants, of the city of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to J. D. & M. Williams, merchants, of the city of Boston, the sum of one thousand nine hundred and sixty-two dollars, in full for excess of duties paid by them on importations of brandy into the port of Boston in the years 1847, 1848, 1849, 1850, and 1851.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 77.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

AYMAR & CO. *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimant's counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal questions, see the opinion in report of David Wood.
4. Statement of amount of claim, received from Treasury Department and transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Aymar & Co., of the city of New York, to the Court of Claims:

Your petitioners respectfully represent, that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of liquors in casks, on which importations duties

were imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, (9 *Howard*, 619;) The United States *vs.* Southmayd *et al.*, (9 *Howard*, 637;) and Lawrence *vs.* Caswell *et al.*, (13 *Howard*, 488,) that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiences in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioners, therefore, pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

AYMAR & CO.

NEW YORK, *June* 23, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

Joseph Gaillard, jr., a member of the firm of Aymar & Co., being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

JOSEPH GAILLARD, Jr.

Sworn to this 23d day of June, A. D. 1855, before me.

J. HILLYER,
Commissioner of Deeds.

IN THE COURT OF CLAIMS.

AYMAR & CO. *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court :

In the years 1847, 1848, 1849, and 1850, the petitioners imported into the city of New York large quantities of rum, brandy, and wine. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but they were required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported amounted to the sum of five hundred and forty-one dollars and twenty cents. See the statement certified by the collector and countersigned by the naval officer of New York. The petitioner made no protest. He does not state whether the liquors, or any part of them, were warehoused ; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet, & Co. Whether the liquors, or any part of them, were or were not warehoused, is wholly immaterial ; for in either event the duties on the liquors not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioners are entitled to relief, and shall report to Congress a bill in their favor for the sum of five hundred and forty-one dollars and twenty cents.

AYMAR & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, and 1850. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496. The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States. 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Aymar & Co., merchants, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the Treasury not otherwise appropriated, to Aymar & Co., merchants, of the city of New York, the sum of five hundred and forty-one dollars and twenty cents, in full for excess of duties paid by them on importations of rum, brandy, and wine, made into the port of New York, in the years of eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, and eighteen hundred and fifty.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 78.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the Hon. the Senate and House of Representatives of the United States in Congres assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ALFRED ATKINS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimants counsel and United States Solicitor see report in the case of David Wood.
3. For the opinion of the Court on the legal question see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Alfred Atkins, of the city of New York, to the Court of Claims:

Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850 and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed, and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the

said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when the duty was imposed; which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the first section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 *Howard*, 619; The United States *vs.* Southmayed *et al.*, 9 *Howard* 637; and Lawrence *vs.* Caswell *et al.*, 13 *Howard*, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioner, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner therefore prays that the Secretary of the Treasury

be called upon by your honorable Court, to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account, and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

ALFRED ATKINS.

CITY OF LONDON, *to wit:*

Alfred Atkins, Banbury, Oxfordshire, being duly sworn, deposes and says, that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

ALFRED ATKINS.

Sworn to this 16th day of August, A. D. 1855, before me, at the Mansion House, London.

F. G. MOON, *Mayor.*

IN THE COURT OF CLAIMS.

A. ATKINS *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1848, 1849, and 1850, the petitioner imported into the city of New York considerable quantities of brandy. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties properly payable on the quantities actually imported was the sum of three hundred dollars.—(See the statement certified by the collector, and contersigned by the naval officer of New York.) The petitioner made no protest. He does not state whether the brandy, or any part of it, was warehoused; nor is there any direct evidence on this point.

This case is, in principle, the same as the case of Sturgess, Bennett, & Co. Whether the brandy, or any part of it, was or was not warehoused, is wholly immaterial, for in either event the duties on the brandy not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturgess, Bennett, & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and shall report to Congress a bill in his favor for the sum of three hundred dollars.

A. ATKINS *vs.* THE UNITED STATES.

Judge BLACKFORD'S dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1848, 1849, and 1850. The ground

of my dissent is, that the duties were paid without any objection, written or verbal.—(See act of Congress of 1845, 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13, Howard, 488, 496. The dissenting opinions in Sturgess, Bennett, & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States. 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Alfred Atkins, merchant, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appointed, to pay to Alfred Atkins, merchant of the city of New York, the sum of three hundred dollars in full for excess of duties paid by him on importations of brandy into the port of New York, in the years eighteen hundred and forty-eight, eighteen hundred and forty-nine, and eighteen hundred and fifty.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 79.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

UDOLPHO WOLFE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. For briefs of claimant's council and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Udolpho Wolfe, of the city of New York, to the Court of Claims:

Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed, and paid by him to the United States, not only on the value

of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when the duty was imposed; which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 *Howard*, 619; The United States *vs.* Southmayd *et al.*, 9 *Howard*, 637; and Lawrence *vs.* Caswell *et al.*, 13 *Howard*, 488, that, according to law, duty was chargeable only on the value of the merchandize *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions, but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner therefore prays that the Secretary of the Treasury

be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account, and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

UDOLPHO WOLFE.

NEW YORK, *July* 19, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

Udolpho Wolfe, being duly sworn, deposes and says, that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

UDOLPHO WOLFE.

Sworn to this 19th day of July, A. D. 1855, before me.
GILBERT S. NIXON,
Commissioner of Deeds.

IN THE COURT OF CLAIMS.

UDOLPHO WOLFE *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1849 and 1850 the petitioner imported into the city of New York large quantities of brandy and gin. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported was the sum of two hundred and ninety-nine dollars.—(See the statement certified by the collector, and countersigned by the naval officer of New York.) The petitioner made no protest. He does not state whether the brandy or gin, or any part of either, was warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet, & Co. Whether the brandy or gin, or any part of either, was or was not warehoused, is wholly immaterial; for in either event the duties on the brandy and gin not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet, & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and shall report a bill in his favor for the sum of two hundred and ninety-nine dollars.

UDOLPHO WOLFE *vs.* THE UNITED STATES.

Judge BLACKFORD'S dissenting opinion.

I dissent from the judgment in this case.

The duties sued for were paid in 1849 and 1850. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619,636; Lawrence *vs.* Caswell, 13 Howard, 488, 496. The dissenting opinions in Sturges, Bennet, & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States. 2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Udolpho Wolfe, merchant, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Udolpho Wolfe, merchant, of the city of New York, the sum of two hundred and ninety-nine dollars in full for excess of duties paid by him on importations of brandy and gin into the port of New York, in the years eighteen hundred and forty-nine and eighteen hundred and fifty.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 80.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MERCY ARMSTRONG *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MERCY ARMSTRONG *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mercy Armstrong, of the county of Gloucester, and State of Rhode Island, respectfully represents that she is the widow of Elijah Armstrong, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She

further states that she was married to the said Elijah Armstrong subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of two hundred and fifty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

MERCY ARMSTRONG *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, stating that Elijah Armstrong, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of two hundred and fifty dollars per annum, commencing on the 3d of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Mercy Armstrong, of Gloucester county, Rhode Island.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of the money not otherwise appropriated, to pay to Mercy Armstrong, the widow of Elijah Armstrong, deceased, an officer in the army of the revolution, the sum of $1,229 17, being for the arrears of her pension at the rate of two hundred and fifty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MISS. DOC. No. 81.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

MARY BURT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-first day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

MARY BURT *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Mary Burt, of the county of Scioto, and State of Ohio, respectfully represents that she is the widow of Benjamin Burt, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Benjamin Burt subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of two hundred and forty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848.

And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

IN THE COURT OF CLAIMS.

MARY BURT *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Benjamin Burt, her husband, died on the 1st day of March, 1849, and that she is now in receipt of a pension of two hundred and forty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the said first day of March, 1849, (the day of her husband's death,) to the 3d day of February, 1853, and we report a bill accordingly.

A BILL for the relief of Mary Burt, of Scioto county, Ohio.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Mary Burt, the widow of Benjamin Burt, deceased, an officer in the army of the revolution, the sum of nine hundred and forty-two dollars, being for the arrears of her pension at the rate of two hundred and forty dollars per annum, from the 1st of March, 1849, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MISS. DOC. No. 82.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee of Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ANN CLARK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificates from the Pension Office transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-first day of February, A. D. 1857. [SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ANN CLARK *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Ann Clark, of the county of Madison and State of Tennessee, respectfully represents: That she is the widow of Jonas Clark, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Jonas Clark subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of two hundred and twenty dollars per annum, on account of the revolutionary

services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, } *ss.*
Washington County,

Be it remembered that on this 26th day of May, 1856, personally appeared before me the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

ANN CLARK *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* the United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Jonas Clark, her husband, died prior to the 4th of March, 1848, and that she has been allowed a pension of two hundred and twenty dollars and eighty-two cents per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Ann Clark, of Madison county, Tennessee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the trea-

sury not otherwise appropriated, to pay to Ann Clark, the widow of Jonas Clark, deceased, an officer in the army of the revolution, the sum of one thousand and eighty-four dollars and ninety-four cents, being for the arrears of her pension at the rate of two hundred and twenty dollars and eighty-two cents per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 83.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

TEMPY CONNELLY *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this 21st day of February, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

TEMPY CONNELLY *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Tempy Connelly, of the county of Johnson, and State of Kentucky, respectfully represents that she is the widow of Henry Connelly, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Henry Connelly subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of six hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of Feb-

ruary, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, } ss.
Washington County,

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

———— ————,
Justice of the Peace.

TEMPY CONNELLY *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Henry Connelly, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of six hundred dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date entitled "An act to continue half-pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Tempy Connelly, of Johnson county, Kentucky.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Tempy Connelly, the widow of Henry Connelly, deceased, an officer in the army of the revolution, the sum of $2,950, being for the arrears of her pension, at the rate of six hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 84.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

NANCY MADISON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

NANCY MADISON *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Nancy Madison, of the county of Fairfield, and State of Ohio, respectfully represents that she is the widow of William Madison, deceased, who was a lieutenant in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said William Madison subsequent to the 1st day of January, 1800, and has been allowed a pension at the rate of four hundred dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to

commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

COURT OF CLAIMS, *ss.*

Be it remembered, that on this 26th day of January, 1857, personally appeared before me, the undersigned, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

NANCY MADISON *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated January 31, 1857, in which he states that there is evidence on file in the Pension Office that William Madison, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of four hundred dollars per annum, commencing on the 3d of February, 1853, under the 2d section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and report a bill accordingly.

A BILL for the relief of Nancy Madison, of Fairfield county, Ohio.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Nancy Madison, the widow of William Madison, deceased, an officer in the army of the revolution, the sum of $1,966 67, being for the arrears of her pension, at the rate of four hundred dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the 2d section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 85.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ANNA PARROT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ANNA PARROT *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Anna Parrot, of the county of Clinton and State of Ohio, respectfully represents: That she is the widow of Joseph Parrot, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Joseph Parrot subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of three hundred and twenty dollars per annum, on account of the revolutionary

services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington county, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

ANNA PARROT *vs.* THE UNITED STATES.

Chief Justice GILHCRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 10, 1857, in which he states that there is evidence on file in the Pension Office that Joseph Parrot, her husband, died on the 28th day of August, 1848, and that she is now in receipt of a pension of three hundred and twenty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half pay to certain widows and orphans." We think the claimant is entitled to the arrears of her pension from the 28th of August, 1848, (the day of her husband's death,) to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Anna Parrot, of Clinton county, Ohio.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Anna Parrot, the widow of Joseph Parrot, deceased, an officer in the army of the revolution, the sum of $1,418 63, being for the arrears of her pension, at the rate of three hundred and twenty dollars per annum, from the 28th of August, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 86.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ROSAMOND ROBINSON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. A bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-first day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ROSAMOND ROBINSON *vs.* THE UNITED STATES.

To the Honorable the Court of Claims of the United States:

Your petitioner, Rosamond Robinson, of the county of Belknap, and State of New Hampshire, respectfully represents that she is the widow of Noah Robinson, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Noah Robinson subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of three hundred and twenty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March,

1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, } ss.
Washington County,

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

ROSAMOND ROBINSON *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that Noah Robinson, her husband, died prior to the 4th of March, 1848, and that she is now in the receipt of a pension of three hundred and twenty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Rosamond Robinson, of Belknap county, New Hampshire.

Be it enacted by the Senate and House of Representatives of the United of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay Rosamond Robinson, the widow of Noah Robinson, deceased, an officer in the army of the revolution, the sum of $1,573 34, being for the arrears of her pension, at the rate of three hundred and twenty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 87.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ESTHER STEVENS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

ESTHER STEVENS *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Esther Stevens, of the county of Van Buren, and State of Michigan, respectfully represents that she is the widow of James Stevens, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said James Stevens subsequent to the 1st day of January, 1800, and has been allowed a pension, at the rate of two hundred and forty dollars per annum, on account of the revolutionary services of her said husband, under the second section

of the act of Congress, approved February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of the said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and district, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

IN THE COURT OF CLAIMS.

ESTHER STEVENS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that James Wilcox, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of two hundred and forty dollars per annum, commencing on the 3d of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Esther Stevens, of Van Buren county, Michigan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Esther Stevens, the widow of James Stevens, deceased, an artificer in the army of the revolution, the sum of eleven hundred and eighty dollars, being for the arrears of her pension at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 88.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

STANWOOD & REED *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. For briefs of claimants' counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal question, see the opinion in report of David Wood.
4. Statement of amount of claim received from Treasury Department and transmitted to the House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimants.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Stanwood & Reed, of the city of Boston, to the Court of Claims:

Your petitioners respectfully represent, that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of liquors in casks, on which importations duties

were imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the first section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, (9 *Howard*, 619;) the United States *vs.* Southmayd *et al.*, (9 *Howard*, 637;) and Lawrence *vs.* Caswell *et al.*, (13 *Howard*, 488,) that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioners, therefore, pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

STANWOOD & REED.

BOSTON, *September* 29, 1855.

COMMONWEALTH OF MASSACHUSETTS,
City of Boston and County of Suffolk, } *ss.*

Jacob Stanwood, a member of the firm of Stanwood & Reed, being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

JACOB STANWOOD.

Sworn to this 29th day of September, A. D. 1855, before me.

EDWARD A. DEXTER,
Notary Public and Justice of the Peace.

IN THE COURT OF CLAIMS.

STANWOOD & REED *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1847 and 1848 the petitioners imported into the city of Boston large quantities of brandy and gin. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported, after deducting therefrom the several sums of money heretofore allowed to the petitioners, amounts to the sum of one thousand four hundred and forty-four dollars.—(See the statement certified by the collector, and countersigned by the naval officer of Boston.) The petitioner made no protest. He does not state whether the liquors, or any part of them, were warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the liquors, or any part of them, were or were not warehoused, is wholly immaterial; for in either event the duties on the liquors not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioners are entitled to relief, and shall report to Congress a bill in their favor for the sum of fourteen qundred and forty-four dollars.

STANWOOD & REED *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847 and 1848. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496.) The dissenting opinions in Sturges, Bennett, & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States.—(2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of Stanwood & Reed, merchants, of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Stanwood & Reed merchants, of the city of Boston, the sum of fourteen hundred and forty-four dollars, in full for excess of duties paid by them on importations of brandy and gin made by them into the port of Boston in the years eighteen hundred and forty-seven and eighteen hundred and forty-eight.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 89.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

T. B. WALES & CO. *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. For briefs of claimants' counsel and United States Solicitor, see the report in the case of David Wood.
3. For the opinion of the Court on the legal questions, see the opinion in report of David Wood.
4. Statement of amount of claim received from the Treasury Department and transmitted to the House of Representatives.
5. Opinion of the Court on the facts.
6. Dissenting opinion.
7. Bill for relief of claimants.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this second day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of Thomas B. Wales & Co., of the city of Boston, to the Court of Claims:

Your petitioners respectfully represent, that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain

quantities of liquors in casks, on which importations duties were imposed, and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, (9 *Howard*, 619;) The United States *vs.* Southmayd *et al.*, (9 *Howard*, 637;) and Lawrence *vs.* Caswell *et al.*, (13 *Howard*, 488,) that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secre-

tary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioners, therefore, pray that the Secretary of the Treasury be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable Court, and that their claim be adjudicated.

THOMAS B. WALES & CO.

BOSTON, *July* 5, 1855.

COMMONWEALTH OF MASSACHUSETTS, }
City of Boston, County of Suffolk, } *ss.*

N. H. Emmons, a member of the firm of Thomas B. Wales & Co., being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true, to the best of his knowledge and belief.

N. H. EMMONS.

Sworn to, this 5th day of July, A. D. 1855, before me.

THOMAS A DEXTER, [L. S.]
Public Notary and Justice of the Peace.

IN THE COURT OF CLAIMS.

T. B. WALES & CO. *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

In the year 1846 the petitioners imported into the city of Boston large quantities of brandy. The quantities stated in the invoices exceeded the quantities ascertained by the gaugers, but they were required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported is the sum of one thousand and two dollars.—(See the statement certified by the collector and countersigned by the naval officer of Boston.) The petitioner made no protest.) They do not state whether the brandy, or any part of it, was or was not warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the brandy, or any part of it, was or was not warehoused, is wholly immaterial; for in either event the duties on the brandy not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and in the case of David Wood, for the reasons on which this opinion is founded.

We are of the opinion that the petitioners are entitled to relief, and shall report to Congress a bill in their favor for the sum of one thousand and *two dollars.*

T. B. WALES & CO. *vs.* THE UNITED STATES.

Judge BLACKFORD's dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1846. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496.) The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States.—(2 Rep. Court of Claims, pp. 58, 61, 63, 65.)

A BILL for the relief of T. B. Wales & Co., merchants, of the city of Boston.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to T. B. Wales & Co., merchants, of the city of Boston, the sum of one thousand and two dollars, in full for excess of duties paid by them on importations of brandy into the port of Boston in the year eighteen hundred and forty-six.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 90.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Received and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

DAVID WOOD *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. United States Solicitor's brief.
4. Opinion of the Court on the petition.
5. Dissenting opinion of Judge Blackford.
6. Statement of amount of claim received from the Treasury Department and transmitted to the House of Representatives only.
7. Opinion of the Court on the facts.
8. Dissenting opinion of Judge Blackford.
9. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this second day of February, 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

The petition of David Wood, of the city of New York, to the Court of Claims:

Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed, and paid by him to the United States, not only on the value of

the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation; which was lost; which did not exist at the time when the duty was imposed; which was not and could not be imported into the United States.

Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.

The claim of your petitioner is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 Howard, 619; The United States *vs.* Southmayd *et al.*, 9 Howard, 637; and Lawrence *vs.* Caswell *et al.*, 13 Howard, 488, that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions; now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioner omitted to protest, he cannot obtain from the Treasury Department payment of his just claim.

Your petitioner believes and submits, that the authority of your honorable Court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioner to present a detailed account of his claim, setting forth the amount thereof, because he is denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up, unless called for by the Court of Claims.

Your petitioner therefore prays that the Secretary of the Treasury

be called upon by your honorable Court to cause to have prepared an account of the claim of your petitioner.

Your petitioner is owner of so much of this claim as arises on importations made on his own account, and the rightful claimant, as factor agent for foreign houses, of so much as arises on consignments to him for sale.

Your petitioner prays to be heard by counsel before your honorable Court, and that his claim be adjudicated.

DAVID WOOD.

NEW YORK, *June* 29, 1855.

CITY AND COUNTY OF NEW YORK, *ss.*

David Wood being duly sworn, deposes and says, that the matters and things set forth in the foregoing petition are true, to the best of his knowledge and belief.

DAVID WOOD.

Sworn to this 29th day of June, A. D. 1855, before me.

J. HELLYER,
Commissioner of Deeds.

IN THE COURT OF CLAIMS.

DAVID WOOD *vs.* THE UNITED STATES.

Brief for Petitioners.

I. The petitioners claim that they have paid more money than the law requires to the collector of the port of New York, on certain importations of liquor in casks, during the years 1847, 1848, 1849, 1850 and 1851, and that they are entitled to a return of the money thus overpaid.

1. Under the tariff act of 1846, *ad valorem* duties on merchandise imported into the United States are payable only on the quantity which actually arrives, and not upon the quantity which appears by the invoice to have been shipped. Duties can be lawfully imposed only on the amount actually brought into port, for that is all which is entered at the custom-house, goes into the consumption of the country, and comes into competition with our domestic manufactures. (Marriott *vs.* Brune 9 How. R., 632; United States *vs.* Southmayd, *Ib.*, 637; Lawrence *vs.* Caswells, 13 How. R., 488.)

2. But the petitioners were called upon to pay, and did pay in the first instance the full duties on the amounts which appeared by the several invoices to have been shipped; and were entitled, when the amount of actual imports and the amount of duties legally payable therefor were ascertained by the officers employed for that purpose by the government, to have the over-payment refunded to them by the Secretary of the Treasury, without protest. This results from the

just construction for the following enactments of Congress: (5 U. S. S., 348:)

Chap. 82, § 2, Act of 1839. *Be it enacted*, &c., That from and after the passage of this act all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of the duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but where it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector or the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated.

§ 21 of the act of 30th of August, 1842, (5 U. S. S., 555,) provides: "That if, on the opening of any package or packages of goods, a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties."

[It was held in Brune *vs.* Marriott, (U. S. cir. ct. Maryland, April, 1849,) that this section applied as well to groceries as to dry goods.]

[As the law stood prior to the act of 1845, the collector might have been sued for over-payments on unascertained duties, where no protest was made, as well as for duties paid under protest. By the court, in Carey *vs.* Curtis, 3 How. R., 244.]

By the act of February 26, 1845, (5 U. S. S., 727,) it was provided: "That nothing contained in 2d section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year 1839,' shall take away, or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares or merchandise imported by him or them, on his or their account, which duties are not authorized or payable in part or in whole by law; to maintain any action at law, against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law. Nor shall anything contained in the 2d second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant

at or before the payment of said duties, setting forth, distinctly and specifically, the grounds of objection to the payment thereof."

§ 2 of act of Aug. 8, 1846, (9 U. S. S., 84,) authorizes the Secretary "out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs, under the sanction of the Treasury Department, for duties on imported merchandise, since the 3d of March, 1833: *Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States, upon the principle involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction."

Section 2 of the act of 3d March, 1849, (9 *U. S. S*, 398,) provides, "That so much money as may be necessary for the payment of debentures or drawbacks, bounties and allowances, which are or may be authorized and payable after the day aforesaid, be and the same are hereby appropriated for that purpose, out of any money in the treasury, to be expended under the direction of the Secretary of that department, according to the laws authorizing said debentures or drawbacks, bounties and allowances."

II. All these acts recognize and proceed upon the fact that there are ome over-payments at the custom-house which should be refunded, without reference to protests. The act of 1839, in terms, draws the distinction between over-payments on unascertained duties and duties paid under protest. This is a legislative declaration, that where the duties are not ascertained, then no protest need be made, for the obvious reason that there is nothing to protest against.

The act of 1842 expressly requires that in the case of an ascertained deficiency in any article imported, the collector should make an allowance for the same in estimating the duties Here the government officers are made the actors throughout, and there is no call for a protest, and no opportunity for one.

But it was decided by the Supreme Court that the act of 1839 took away the action against the collector, and to remedy this difficulty, among other matters, the act of 1845 was passed. This act does not touch the question of "*unascertained duties*," distinguished in the act of 1839 from duties paid under protest, nor the *allowance for deficiencies*, specially provided for in the act of 1842; these were left as they stood under those laws. In these cases the government had the money, the goods, and the power of applying their own rules and regulations through their own officers in every instance. When the legal duties were ascertained, and when the deficiency, if any, was ascertained, it was made the duty of the Secretary of the Treasury, in the one case, to draw his warrant for any over-payment, and of the collector, in the other, to make an *allowance* for it in estimating the duties.

But there were some cases different and distinct from over-payments of unascertained duties, and from estimated allowances for deficiencies, in which a notice or protest had been sometimes resorted to with the view of fixing the responsibility of the collector, and for no other

reason.—(Cary *vs.* Curtis, 3 *Howard's R.*, 244; Swartwout *vs.* Gihon, 3 *Ib.*, 110; Bank of United States *vs.* Bank of Washington, 6 *Pet. R.*, 19.) The act of 1845 does not enlarge the class of cases in which the protest is called for; it does not give any new virtue to the protest, which never *creates* a right to recovery, but only operates on a right already existing; but it says that in cases where a protest is made, it shall be of no avail against the collector, nor as authority to the Secretary of the Treasury to refund, unless it is *in writing*, and sets forth *distinctly and specifically* the grounds of objection to the payment of the duties in question.

Now it is clear enough that in cases where the grounds of objection can be *distinctly and specifically* furnished ONLY by the government, on the ascertainment of facts by its own officers, a protest at the time of payment is impossible and useless, because it cannot be made distinct and specific, and because the government itself must ascertain and communicate to the importer the facts which establish its own liability, and on the ascertainment of which it is bound to *refund overpayments and make allowances*. The law makes it the duty of the government officers to refund and to make allowances as soon as they ascertain the facts which *would enable the importer to make a distinct and specific protest*. Surely it never could have been the intention of Congress to enact that, when the government officers communicated to the importer the ascertained facts which affected them with certain duties, that they were released from those duties unless the importer protested distinctly and specifically, in writing, that they ought to do what the law required of them.

But with all these exceptions, recognized by the acts of 1839 and 1842, and modifying the act of 1845, it was still found to work injustice by its call for a protest, and the second section of the act of 1846 was passed, applying, within certain limits, to *all cases* of illegal exactions, whether protest was made or not, and authorizing the Secretary to refund, wherever he shall be satisfied, by decision of the courts on the principles involved, that illegal exactions had been made. And the second section of the act of 1849 gave him the wherewithal to meet all the *allowances* authorized by law.

III. The practice of the Treasury Department for a series of years was based upon the view of these statutes which is here presented, and by which the petitioners were governed. The petitioners construed these laws as they were construed and acted upon by the Secretary of the Treasury during the whole period within which their importations were made.

(*a.*) When the tariff of July 30, 1846, (9 *U. S. S.*, 42,) went into operation, viz.: December 1, 1846, duty was taken on the value of deficiencies in importations of liquors and other merchandise. The Treasury Department afterwards, as per letter to the collector of New Orleans of January 30, 1847, (9 *Howard*, 620,) considered that no such charge was authorized by law. The latter decision was suspended or reversed on March 24, 1847.—(9 *Howard*, 621.) But the moneys collected at the port of New York, as for duties on deficiencies in importations of liquors, occurring between December 1, 1846, and March 24, 1847, were refunded without regard to protest having

been made or omitted.—(*Vide* treasury instructions of July 28 and September 3, 1847, in the case of E. Stevens' Sons; of October 12 and November 6, 1847, in the case of S. T. Nicoll & Co.; of December 24, 1847, and March 15, 1848, in the case of John Durand & Co.; of January 10 and March 2, 1848, in the case of Hilger & Co., &c., &c., &c.)

(*b.*) Under the 2d section of the act of August 8, 1846, above cited, the Secretary of the Treasury has considered that he had the power to refund duties not paid under protest, in case it was ascertained, by decisions of the courts of the United States upon the principle involved, that the duties had been illegally exacted; and such power has been frequently exercised.

Vide treasury circular of 13th November, 1847, (1 *Mayo*,) and treasury letters of May 7 and July 21, 1847, therein referred to; treasury circular of August 10, 1850, (1 *Mayo*,) ordering the refunding of the duties exacted on deficiencies in importations of sugar and molasses, under which circular a very large amount of money, not paid under protest, was refunded; treasury letter of June 14, 1851, to the collector of Baltimore, ordering the refunding of duties illegally exacted on glazed calf skins, seeds, and vermillion, "without reference to protest against the rate of duty charged;" treasury letters to the collector of New York of August 29, 1851, in relation to linen cambric handkerchiefs; of December 24, 1851, in relation to the depreciated currency of Austria; and of April 21, 1852, in relation to goats' hair or mohair plush.

2d. The Treasury Department's construction of the 2d section of the act of August 8, 1846, to the effect that it directs the return of duties illegally exacted, "without reference to protest," was doubtless correct; the act of March 3, 1839, above cited, already made it "the duty" of the Secretary of the Treasury to refund illegal "*duties paid under protest.*" This enacted something more, and the courts must so interpret it, or treat it as vain and superfluous legislation.

(*c.*) The Treasury Department has continued to act upon this construction of the law in certain cases, and has ordered payment of numerous claims for duties where there was no protest. But it still refuses to refund our over-payments, or to make any allowances for the deficiencies in our importations, though they have long since been ascertained and estimated for.

But not only has it found the authority to refund moneys paid without protest in the acts above cited, but also in the 2d section of the act of October 16, 1837, which authorizes the Secretary of the Treasury to pay such things as are charges upon the revenue without requiring protest, and the allowances in question are such charges.—(See treasury circular of August 10, 1850; Report on the Finances, of December 4, 1854, page 74.)

It is the present practice of the government always to take duty on the invoice quantity, and when the deficiency is ascertained to make the proper allowance, without requiring a protest.

The 2d section of the act of 1839 has been also understood by the Treasury Department to authorize the return of illegal duties not paid under protest, when the *rate* of duty has not been ascertained with

certainty. "You are instructed to return as *unascertained duties*, in the manner directed by the act of Congress, approved 3d March, 1839, any excess of duty that you may have exacted on imports manufactured in whole or in part from steel or iron," &c.—(Letter of First Comptroller, August 23, 1843.)

IV. Under the foregoing statutes and decisions bearing on them, we claim from the United States the repetition of our money as a charge upon the revenue, (act of 1837,) as an over-payment of unascertained duties, (act of 1839,) or as money illegally exacted, (act of 1846,) or as an allowance ordered to be made, (act of 1849,) in estimating the duties, where a deficiency is ascertained to exist on examination by the appraisers.

If this money is found to be due and payable under any of these statutes, then the Court will of course so certify to Congress, with the necessary bill for the relief of the party. But if the Court should find that we are not thus entitled, then it will consider whether or not we are entitled, under any contract, express or implied, with the government of the United States, and calling for the passage of a new law.

And, first, there is a contract arising from the provisions and limitations of the Constitution. That is an express contract of each individual with all the rest, and of all the people with the government they thereby establish, that taxes shall be uniform, and that individual property shall be secure to the owner.

There is an express contract that the executive officers shall raise from the people such taxes as the legislature shall authorize, and no other; and on the part of every individual there is a contract to pay just such taxes, and none other. There is an *implied* contract arising from the guarantee of my property, not only that the government will not take it from me by fraud or force, but that if it comes into possession of it under circumstances that would work a violation of the Constitution to my injury, it will make restitution. For as the government cannot, under the Constitution, directly deprive me of my property without compensation, it cannot do it indirectly by taking it under color of official authority without making restitution, whether it has proceeded in mistake of law or in mistake of fact.

The Constitution provides, (section 8,) that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and welfare of the United States, *but all duties, imposts and excises shall be uniform throughout the United States.*"

It provides, also, (article 5 of amendment,) that no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The section 8 does not mean merely that imposts shall be uniform as far as places are concerned, to wit, uniform in Massachusetts and in Louisiana, but uniform, also, as far as *individuals* are concerned, to wit, that A. shall pay the same duties as B., and none other.

It is the duty of every department of the government so to discharge its functions as to secure the great results contemplated by the organic

law. Congress should so frame its statutes, the Executive should so administer them, and the judiciary so construe and interpret them, that the great ends which the Constitution is manifestly intended to attain should be secured. Perfect uniformity in taxation, and perfect inviolability of private property, are two great constitutional provisions, which no department can directly violate, and which no department ought to violate by indirection; but both are violated, if, on any pretence, more duties are exacted from A. than from B. for the same amount of imports; or, if duties are exacted from A. which he did not legally owe, and the property of A., which, by misconstruction of law, has come into the treasury of the United States, can be appropriated to the public use without just compensation.

V. When the government permits itself to be impleaded, as in this Court, it submits to consider itself as affected, like other defendants, by moral obligations, equities and duties.

For all legal purposes, in the relation to rights and duties, the civil law regards the *fiscus* as a moral person.—(1 *Kaufmann's Mackeldy*, 149.) It is only by so regarding it that we can suppose the government of the United States to be affected by implied contracts, and amenable to the general principles which govern such contracts. Thus regarded, it is liable to make restitution to the plaintiffs, on the general principles of law which govern the action for money had and received.

The grounds on which this action may be maintained are thus stated by the court, in the case of Cary *vs.* Curtis, 3 How., 249:

"We will now recapitulate the principles on which the action for money had and received may be maintained. They are these: 1st. *Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund.* 2d. in the case of an agent, when such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over he received notice of the plaintiff's claim, and a warning not to part with the fund. 3d. Where there exists a privity between the plaintiff and the defendant."—(See Edwards *vs.* Bates, M. & G., 598.)

This doctrine of the court, as announced by Daniel, J., is a re-affirmance of the principles laid down by Lord Mansfield, in Moses *vs.* McFarlane, *Burr.*, 1012. Of this case, an eminent judge (Thompson) says, (4 *John. R.*, 250,) that its principles are derived from the juridical wisdom of the civil law, *and are founded on the immutable rules of justice and moral honesty.* The Supreme Court allude to it and re-affirm it by name in Bend *vs.* Hoyt, 13 *Pet. R.*, 269, and in Cary *vs.* Curtis, 3 *How.*, 246.

In the latter case they say, further, (*Ib.*, 250,) "We all know that this action for money had and received is founded upon what the law terms an implied promise to pay, what in good conscience the defendant is bound to pay to the plaintiff. It being, in such case, the duty of the defendant to pay, the law imputes to him a promise to pay. It was upon this principle that the action for money had and received was sustained, in the case of Elliott *vs.* Swartwout. *There money had been taken by the collector for duties which were not imposed. The*

money lawfully belonged to the plaintiff. It was the duty, therefore, of the collector, to pay it back to him."

The court held, in this very case, (and, also, in Swartwout *vs.* Gihon, 3 *How.*, 110,) that the notice or protest was of no further use than to warn the collector of an intention to hold him personally responsible. The money paid for duties which were not imposed lawfully, belonged to the plaintiff, and that with or without notice; they were therefore unlawfully exacted or retained by the collector, and it became his duty to pay them back.

Lord Mansfield, in Bize *vs.* Dickason, 1 *T. R.*, 285, "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt which would otherwise have been barred by the statute of limitations or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action."

The Supreme Court, (per Story,) in 13 *Pet.*, 269, says of Bize *vs.* Dickason: "Now, admitting the entire correctness of this [its] doctrine, to the full extent, (and no more than general truth can be imputed to it,) it leaves the whole matter open upon which the present controversy tends, and that is, *whether there is any want of conscience in the collectors's retaining the money.*"

So Thompson, J., says of the same case: "The true doctrine on this subject is laid down in the case of Bize *vs.* Dickason, 1 *T. R.*, 286." After quoting *ut supra*, he says: "If this be the true rule, of which I think there can be no doubt, the plaintiff has a right to recover back the money in this case."

In Sadler *vs.* Evans, the court say, it is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. *The defence is any equity that will rebut the action.*—(4 *Burr*, 1766.)

"When money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; *and the law, at the very time of payment, creates the obligation to refund it.* A notice of intention to recover the money back does not, even in such cases, create the right to recover it back; *that results from the illegal exaction of it;* and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."—(B. of U. S. *vs.* B. of Washington, 6 *Pet.*, *R.*, 19.)

Judge Story, in his elementary book on Agency, § 394, thus lays down the result of the cases:

"When, however, money is obtained from third persons by public officers illegally, but under color of office, it may be recovered back again from them, if notice has been given by the party, at the time, to the officer, although the money has been paid over to the government; *and if it has not been paid over, but it remains in the officer's hands, it may be recovered back, even without notice.* And it will make

no difference in the case that the payment was originally made under a misconception or miconstruction of the law, by both or by either of the parties."

Now we contend that under these authorities we are entitled to the repetition of this money, which is admitted to be ours, unless the United States can set up some substantial *equity* to bar the action. They may set up—

First. The absence of protest. We deny that this is any answer in equity, or even in strict law.

It is an answer in law and in equity for an endorser to set up want of *notice* of non-payment by the maker. It is an answer for a known agent, who has paid over to his principal money paid to him by mistake of law or fact, that he has paid it over without notice.

But neither of these answers avails, in law or equity, the maker of the note, or the principal who has received the money that belongs to some one else.

The reason that the endorser and agent are discharged by the want of notice is, that it may affect their relations to the parties or their funds. The agent might have held on to the money; the endorser might have secured himself on the property of the maker. This was dwelt upon by the Court, in Bend *vs.* Hoyt. The relation of the United States to the property and the evidence of it, had been changed—by a mistake of fact, arising from the culpable negligence of the plaintiff—and therefore it was held that it was not unconscientious in the United States to retain the money. They had parted with the means of settling the question for themselves by inspection. Nothing of all this arises in this case We proceed entirely on the government's own evidence. The government, since the over-payment, has, by its own officers, ascertained that we have paid duties on goods that we never imported, and we claim that are entitled to a repetition of the over-payment, or an allowance for the deficiency; or, in other words, a return of our money, which the government has in its hands.

Second. The second equity that may be set up is, that this is a *voluntary payment* or gift on the part of the plaintiff, and therefore not liable to repetition.

This monstrous legal fiction, or falsehood of law, can never be regarded by this Court as a *substantial rebutting equity.* But in a case like the present, it is no answer even in law.

Story's Agency, § 394, and cases cited in note; Comb. 447; Astley *vs.* Reynold's, 2 Str., 915; Willes, 536; 2 Sid., 4; Lofft, 753; 1 B & P., 139; Shaw *vs.* Woodcock, 7 B. & C., 73, 84; Irving *vs.* Wilson, 4 T. R., 485; Smith *vs.* Bromley, Doug., 696; Salk., 22, pl. 2; Ashmole *vs.* Wainwright, 2 Q. B., 845, 6; Valpy *vs.* Manly, 1 C. B., 602, 603; Dew *vs.* Parsons, 2 Barn. & Ad., 562; Morgan *vs.* Palmer, 2 B. & C., 735.

The maxim, *volenti non fit injuria,* holds only in cases where the party has a *freedom of will,* which he has not in transactions of this nature with the government. *Velle non creditur qui obsequitur imperio patris vel domini. Poth. Reg. Ju.,* viii., 3 *Coacta voluntas non habetur pro voluntate.*

In Shaw *vs.* Woodcock, (7 B. & C., 73,) Holroyd, J., says: "Where the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary but a compulsory payment, and may be recovered back; and if the plaintiff below was compelled to make the payment in question, in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back.

In Smith *vs.* Bromley, (Douglas, 697,) Mansfield, J., speaks of the absurdity of the misapplication of *volenti non fit injuria*, in the case of the man who pays from mere necessity more than the other can in justice demand, and who is called, in some courts, the slave of the lender.

See, also, Parker *vs.* Great Western Railway, 7 Man. & Gr., 293; Close *vs.* Phipps, Ib., 586; Pitts *vs.* Coomes, 2 Ad. & El., 460; Snowden *vs.* Davis, 1 Taun. R., 362; Carter *vs.* Carter, 5 Bing. R., 408.

Third. It may be set up as a rebutting equity that the money has been exacted by the government in mistake of the law, and is therefore not liable to repetition.

The argument then must be, that the United States have misconstrued the law to the injury of the petitioners and to their own advantage, and it is, therefore, equitable that they should keep the petitioners' money.

Now this money, if exacted and retained without law, is wrongfully and illegally exacted and retained. Ignorantia legis neminem excusat. If any man violates the law he must be held to violate it intentionally, because he cannot set up ignorance as a defence in a civil or criminal action. Then come in the principles of law: "Nemo ex suo delicto meliorem suam conditionem facere potest." "Poth. Reg. Ju., xxxiv.) "Error facti ne maribus quidem in damnis vel compendiis prodest: Juris autem error nec fœminis in compendiis prodest. Cæterum omnibus juris error, in damnis amittendæ rei suæ non nocet." (D. 22, 6 de Jur. et fac. Ig.) "Juris ignorantia non prodest acquirere volentibus: suum vero petentibus non nocet." (l. 7, ff. d. tit.) "Hoc natura œquum est neminem cum alterius detrimento fieri locupletiorem." (l. 14, de Cond. Indeb. D. 12, 6.)

Suppose there was a mutual ignorance in this case, both of the facts and the law. It is well settled that the money thus paid is liable to repetition. But supposing the mistake to be merely one of law, the better opinion now is, that money paid under a mistake of law, which there was no natural obligation to pay, may be recovered in an action for money had and received. This is the inevitable consequence of the principles regulating this action, as laid down by the Supreme Court in the cases cited.

(Ancher *vs.* Bank of England, Douglas, 638; Bize *vs.* Dickason, 1 T. R., 285; Farmer *vs.* Arundel, 2 Black. R., 824; Chatfield *vs.* Paxton, Chitty on Bills, 102; Perrott *vs.* Perrott, 14 East, 439; Lansdown *vs.* Lansdown, Moseley, 364; Haven *vs.* Foster, 9 Pick, R., 117; Hunt *vs.* Rousmanier, 8 Wh. R., 174; Lawrence *vs.* Beaubien, 2 Bailey S. C. R., 623; Fitzgerald *vs.* Peck, 4 Litt. 125; Lamah *vs.* Row-

ley, 6 Harr. & John., 500; Lowndes *vs.* Chisden, 2 McCord's Ch. R., 455; Hopkin's Ex'r *vs.* Maryck, 1 Hill's Chan. R., 151.)

Money paid by a collector in ignorance, misconstruction or disregard of an act of Congress, has been recovered back by the United States in an action for money had and received.—(United States *vs.* Bartlett, Davies, 1.)

(See opinion of Chambre, J., in Brisbane *vs.* Dacres, 5 Taun. R., 144; and that of Senator Paige, in Chaplin *vs.* Layton, 18 Wend. R., 422, and cases there cited.)

And see a very able and conclusive review of the subject and the cases in Northrop *vs.* Graves, 19 Conn. R., 548; the doctrine of which is re-affirmed in Stedwell *vs.* Anderson, 21 Conn. R., 240.

See 2 W. D. Evans' Pothier on obligations, 336 to 339. Code Civil, Tit. 4, Livre 3, Article 1376. 1 Motifs, &c., du Code Civil, 521, 514, 516. 2 Ib. 506.

Fourth. It may be contended that the allegation of laches is a rebutting equity in regard to the omission of protest.

We have already cited the cases in which the Supreme Court has said that the only object of the protest is notice to the agent, and that the liability of the principal arises, not from the protest, but from the illegal exaction. It has been so held, also, by committees of the legislative departments.

The Committee of Finance of the Senate (XXIX Con., 1st sess. Rep., 320) says: "In all cases where a greater amount of duty has been exacted upon foreign imports than was authorized by law, the excess ought to be refunded. It is not material to the action of Congress whether the payment was accompanied by a protest or not. The original wrong was in the exaction of a duty not authorized by law; and it is not to be presumed that the importers paid the excess voluntarily; and, even if they did, upon discovery of the error, it ought to be corrected."

So the Treasury Department has taken the same view, in a letter to the collector of New York, of October 7, 1844: "It being the opinion of the department that, whether paid under protest or not, the claimant is equally entitled in justice and equity to the return of duty illegally demanded and paid."

So in the following extract from "Report of the Secretary of the Treasury on the state of the finances," dated January 15, 1853, XXXII Congress, 2d session, Senate Ex. Doc. No. 22, p. 19:

"The Supreme Court, in the case of Lawrence *vs.* Caswells, decided that no return of duties could be claimed by parties who had not, at the time of making the entry, entered a written protest declaring specially the grounds on which they objected to pay the duties; and the department has felt itself bound by that decision, and has since declined to refund any duties alleged to be illegally assessed, except in cases where such written protest was made at the time, or where it evidently arose from a clerical error. This course involves great hardship in many cases, where even the same parties having in certain entries made a regular protest, have received back the duties erroneously assessed, agreeably to legal decisions; while in other cases, precisely similar in every respect, but where the formality of a protest

was not observed, no return can be made under the above decision of the Supreme Court. I would recommend these cases to the favorable action of Congress; by investing in the Treasury Department the power to return duties in all cases which may be similar to those on which the Supreme Court may have made decisions in favor of the claimants, even if no protest has been made at the time by the parties."

This extract shows the judgment of the Treasury Department in regard to the equities involved in the case before the Court, though it takes an erroneous view of the decision of the court in the case of Lawrence *vs.* Caswells. For though it was held in Mason *et. al. vs.* Kane, that the duty illegally exacted could not be *recovered of the collector* at law, because of the insufficiency of the protest, the court remarked: "If improperly charged, it is no doubt yet in the power of *the administrative department* to do justice to the claimant."—(U. S. cir. ct., Maryland circuit, April term, 1851.)

VI. The parties who have paid excessive duties are entitled to the return of the same, and are the only parties entitled thereto; and have been so uniformly regarded by all the departments of the government.

(*a.*) The 2d section of the act of March 3, 1839, directs the refunding of illegal duties to the parties "entitled thereto." And the Treasury Department has always paid the importer or owner, deciding that he was the party entitled under the law, and it has never paid any other party.—(*Vide* Treas. Cir., November 13, 1847.)

(*b.*) The act of February 26, 1845, requires that the importer or party who pays illegal duties, should protest against the exaction, and authorizes him only to maintain an action for the recovery of the same, thus recognizing the importer as the only legal claimant.

A consumer, who obtains possession of merchandise after it is imported, cannot make a valid protest against the charge of illegal duties, or maintain any action for the recovery of the same.

(*c.*) The 1st section of the act of August 8, 1846, directs the refunding of duties illegally exacted to the importers of the merchandise on which the duties were taken, naming them, and without reference to any other parties

(*d.*) The 2d section of the act of August 8, 1846, authorizes the Secretary of the Treasury to refund duties illegally exacted "to the parties entitled thereto;" and such refunding has always been made to the consignee or owner of the merchandise.—(*Vide* Treas. Cir., Nov. 13, 1847. See, also, 6 *U. S. S.*, 22, 212, 234, 237, 240, 263, 268, &c.; *Ib.*, 489; 9 *Ib.*, 662, 720, 743, &c.)

(This circular, of Nov. 13, 1847, intimates a doubt in the Secretary's mind as to the soundness of the policy of the law which gives back to the importers duties illegally exacted, instead of paying them to the unexpecting consumer; but, nevertheless, directs that the importer be the recipient of the same.)

(*e.*) The circuit courts and the Supreme Court of the United States have in numerous cases decreed the return of illegal duties to the importers who had paid the same.

There is no instance in which the duty has been refunded to any other than the person from whom it was exacted.

VII. The practice in assessing duties at all the ports of the United States, since June 14, 1851, in conformity with the treasury instructions of that date, (1 *Mayo*,) has been to make such allowances as are now claimed on all articles imported.

Prior to that time and subsequently to July 5, 1850, in conformity with the treasury circular of that date, (1 *Mayo*,) such allowances were made only on importations of sugar and molasses.

JOHN O. SARGENT,
CHARLES ABERT,
Of Counsel for the Petitioners.

IN THE COURT OF CLAIMS.—No. 63.

ON THE PETITION OF DAVID WOOD, CLAIMING RETURN OF DUTIES PAID WITHOUT PROTEST.

Brief of the United States Solicitor.

STATEMENT OF THE CASE.

The petitioner represents that he paid more duties than the law imposed on certain liquors imported between the years 1847 and 1851, and prays that the amount may be refunded.

The petition states that the "claim of your petitioner is founded on the 16th and 21st sections of the act entitled 'An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,' approved August 30, 1842; the 1st section and schedule A of the act entitled 'An act reducing the duty on imports, and for other purposes,' approved July 30, 1846; the 2d section of the act entitled 'An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise,' approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851."

These acts are found in vol. 5, Stat. at Large, pp. 563, 565; vol. 9, pp. 44, 84.

The acts relied on are, first, the 16th section of August, 1842, which prescribes, that when ad valorem duties are imposed, the market value in the country whence imported shall be ascertained, and costs added.

§ 21 requires an examination of one package in ten of every invoice; imposes forfeitures for fraud, and provides, that if deficiency shall be found, an allowance shall be made in the estimate of duties.

Schedule A of act 1846 imposes a duty of 100 per cent. ad valorem on brandy and other liquors.

§ 2 of August 8, 1846, authorizes the Secretary of the Treasury to refund duties illegally exacted; "*Provided*, that before any such refunding, the Secretary shall be satisfied by the decisions of the courts

of the United States, UPON THE PRINCIPLE INVOLVED, *that such duties were illegally exacted;* and *provided, also,* that such decisions of the courts shall have been *adopted or acquiesced in* by the Treasury Department, as its rule of construction."

The petitioner further alleges, that "it has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et. al.*, 9 Howard, 619; The United States *vs.* Southmayd *et. al.*, 9 Howard, 637; and Lawrence *vs.* Caswell *et. al.*, 13 Howard, 488—that, according to law, duty was chargeable only on the value of the merchandise *imported* into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

"The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioner, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; *but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors, unless protests were made against the illegal exactions,* now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your *petitioner omitted to protest,* he cannot obtain from the Treasury Department payment of his just claim.

"Your petitioner believes and submits, that the authority of your *honorable Court is not limited by the provisions of the said act of* February 26, 1845, or *any other law restricting the power conferred on the Secretary of the Treasury.*"

Act of 1845, (*Protest act.*)

The act of 1845, referred to in the petition, is in these words:

"That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away or impair, the right of any person or persons who have paid, or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or mechandise, imported by him or them, or on his or their account, which duties are not authorized or payable, in part or in whole, by law; to maintain any action at law against such collector, or other person acting as such; to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid

under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at Large, p. 727.)

Allegation that Department paid claims "resting on same basis."

The allegation that the Secretary of the Treasury has allowed and paid numerous claims resting on the same basis as this under *the decision*, must be taken to refer to the action of the Secretary under the decision in 9 Howard, because the alleged refusal on his part to pay any such claims is entirely consistent with the decision in 13 Howard, which was in fact intended to correct the construction put on the previous decision stated in the petition, and to arrest the obvious mischief resulting from such misconstruction.—(See further on this point below.)

Opinion of Supreme Court in Lawrence vs. Caswell, 13 *How.* 496.

In Lawrence *vs.* Caswell the court say: "The importers claimed in their protest, that the duties should be computed upon the actual contents, as shown by the gauger's returns, after deducting two per cent. from such contents; and the court was of opinion, and so directed the jury, that this was the correct mode of ascertaining the duties, and a verdict was accordingly rendered and judgment given for the amount overcharged. This writ of error is brought to revise that judgment. Two questions arise in the case: 1st. Whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's returns? And, 2dly, whether the two per cent. ought to have been deducted for leakage?"

As relates to the first question, the court, in delivering their opinion on that point, say: "It is substantially the same with that decided by the court in the case of Marriott *vs.* Brune, 9 H. 619. The duty of 100 per cent. *ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was, therefore, illegally exacted, and the defendants in error were entitled to recover back the amount. The judgment of the circuit court is in this respect correct.

"But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of *duties illegally exacted*, the court mean *to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection.* Where no protest is made, the duties are not illegally exacted, in the legal sense of the term; for the law has confided to the Secretary of the Treasury the power of deciding in the first instance the amount of duties due on importations. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, with-

out appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. *But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest.* NOR ARE THEY WITHIN THE PRINCIPLE DECIDED IN THE CASE BEFORE US."—(Lawrence *vs.* Caswell, 13 Howard, 488, 496.)

Construction of the act of 1846, *to refund excess of duties, &c.*

It appears by this language, as well as by the fact that the Attorney General, Mr. Crittenden, declined arguing the point, that the question as to the allowance for the differences shown by the gaugers' returns was not deemed an open question, since the decision in Marriott and Brune, but that the court deemed it important to explain, that such over-payments were not to be deemed illegal exactions, or within the principle of the case decided by it, unless the importer protested against paying them.

The law of 8th August, 1846, relied on by the petitioner, requires "that, before any such refunding, the Secretary shall be satisfied, by the decision of the courts of the United States, *upon the principle involved, that such duties have been illegally exacted.*"

The department had held, as stated in the petition, that the decision in Brune and Marriott authorized the return of duties charged on deficiencies, although there had been no protest, and, therefore, had interpreted the decision as declaring that such duties were *illegally exacted*, within the meaning of the act of 1846, which authorized the Secretary to refund only in cases where, *upon the principle involved*—that is to say, in similar cases—the courts had said the duties were illegally exacted.

When the decision was made in Lawrence vs. Caswell, there was no alternative for the department (which is expressly required by the act of 1846 to follow the decisions of the court, and cannot refund duties which that court declares have not been illegally exacted) but to do what the petitioner charges was done, refuse to pay any such claims.

It has been said by the court, I know, that the language of the Supreme Court is not to be deemed a construction of the act of 1846, (see opinion in Beatty's case, p. 13,) because, in such case, the Supreme Court would be held to declare that no duties could be held to be illegally exacted unless protest had been made according to the requirements of the act of 1845, whereas the act of 1846 embraces such sums as had been illegally exacted since 3d March, 1833. And before 1845 it was not usual, in a protest, to state the grounds of objection, nor was it necessary to do so, wherefore such a construction would, to some extent, repeal the act of 1846.

No authority is cited for the position that, prior to 1845, it was not required to state the grounds on which the protest was made. If the court, however, has examined that question, I would not express a doubt on the point on any other grounds than mere general principles;

but if the court has only assumed it on the statement of counsel, I should be inclined to think it ought to be further investigated.

And I am the more disposed to question it, from considering the act of 1845, which was not designed to introduce new principles of law, but, as this Court say in Beatty's case, p. 10, was merely declaratory, except in requiring more reliable *proof*, as is forcibly stated by Chief Justice Taney, in the case of Mason & Tullis *vs* Kane, and to that extent changed the law of evidence.

That act is applicable as well to cases arising before as since its adoption; and as it requires the grounds of protest to be specifically stated, it affords the highest evidence of the law previously in force, of which it is said to be merely declaratory.

But whether this be true or not, is not material to the maintenance of my proposition, that the language of the Supreme Court was intended to govern the treasury officers in their action under the law of 1846.

1. Because if the consequence should be to make the Supreme Court hold that no over-payments are illegal except those made under protest, it does not follow, as this court has supposed, that this works any repeal of the act of 1846.

The act of 1846 authorizes the refunding of such *illegal exactions* as far back as the year 1833; but it is only when the court shall decide that they are illegal by acting on the same questions in some case on which suit has been brought. And as the act of 1845 both prohibits any refunding by the Secretary of payments, except those made under protest, and forbids the courts to entertain a suit unless the prescribed protest shall be made; and as the act relates to all cases as well before as since 1845, it is not possible that any case can occur in which the courts should settle any principle for the guidance of the departments, as contemplated by the act of 1846, in which there has not been a protest as required by the act of 1845.

2. Nor would it at all detract from the force or significance of the language of the Supreme Court, if it were admitted that cases might arise under the act of 1846 which were not also embraced by the act of 1845. For, although there should be a case supposable, originating before 1845, where the Secretary would be authorized to pay without there having been protest, certainly this is not one of that kind.

3. The fact that the act of 1846 was not discussed in the case does not make the opinion extra-judicial. It was not extra-judicial, because the court is made by law the guide of the Treasury Department in the construction of the revenue laws; and it is therefore the duty of the court, when the occasion presents itself legitimately, and it is known that a mischievous misconstruction has been put on a previous decision, to correct it by a full and explicit explanation of the decision. It will hardly be said that the occasion chosen was not proper; or, when the extent of the mischief is regarded, that it was not demanded by every consideration of public good.

4. The supposition that the court merely intended to say that a suit could not be maintained to reclaim duties without protest, is not sufficient to account for the explanation, because there is nothing to

show that any one ever supposed such a suit could be maintained, and the express words of the law would seem sufficient to guard against such a possibility ; nor does it seem to me that there is anything in the context, or the case, to suggest the want of such an explanation to guard such a possibility ; for it appears not only that there was protest here, but it is said the point was ruled in Brune's case, in which it which it was expressly decided that suit would not lie "on a protest made after the case was closed up," &c.

What the petition states in substance.

The petitioner, in substance asserts that he is entitled to reclaim certain sums of money paid the collector *without protest*, in the course of five years ending in '51, which the Supreme Court have decided he was not bound to pay ; and that *if he had protested against* paying, he would have been entitled to recover from the collector by suit, or to receive it from the treasury, under the law of 1846, on the decision of the principle involved by the court in other cases.

The position taken, therefore, by the petitioner, is, that the Supreme Court having ruled his payments to have been over-payments, he is entitled to make reclamation, although that court in the same opinion decide that his over-payments were not illegally exacted ; were not recoverable by suit, and were not within the provisions of the act of 1846, so as to entitle him to payment by the Secretary of the Treasury.

No claim in petition for payments on account of "unascertained duties."

In considering this question, heretofore, in the case of Sturgess, Bennett & Co., the Court has treated a similar petition, to that now under consideration, as averring that such payments were made on account of unascertained or estimated duties, and for that reason declared that the act of 1845 was inapplicable to the case presented in the petition, inasmuch as the act was silent on the subject of unascertained duties.—(See Op., p. 7.)

Now, there is nothing in the petition from which it can be inferred that the over-payments were payments made on account of unascertained duties. Neither the words "unascertained duties," or any equivalent expressions, are to be found in the petition, nor is there a circumstance stated to distinguish the payments made in these cases from those in the decisions referred to in the petition, and relied on to support the claim, except that no protests were made.

When duties are spoken of as estimated. or unascertained, or liquidated, it is the process, not the law regulating it, which is referred to. No one is supposed to refer to anything but the fact, when he says that he paid the amount estimated to be due by the collector. He would not be held to say that the collector estimated the amount correctly, as the law has been subsequently expounded. So, the law, which uses language as it is commonly understood, when it speaks of moneys paid on account of unascertained duties or otherwise, refers to the payments as they are understood at the time ; and if one should

say that he paid money for account of unascertained duties in 1850, when, in fact, his payments were made for adjusted duties, he could not escape as a perjurer, on the sophism that it had since been decided that the rule of adjustment then in use was since held to be illegal, because, whether legally or illegally adjusted, the adjustment was in fact made; he recognized it, allowed and paid it as such, and it would be falsification of a material fact to deny that any adjustment was made in fact, because any attorney might advise that there was no difference in point of law.

The claim in argument presents the protest question in another form.

But the adjustment, though not made as the law required was obligatory if not protested against—is the law, as pronounced by the highest tribunal, and as effectual to bar any suit against the collector, or any claim against the treasury, under the law of 1846, as if the mode of adjustment adopted had been always held to be in strict conformity to law. It does not, therefore, change the nature of the question or advance the claimant's cause, to attempt to consider the payments, though made in fact as payments of liquidated duties, as legally and essentially nothing but payments on account of unascertained duties, on the ground that the mode of ascertainment has been declared illegal, because they are not illegal under all circumstances; and, on the contrary, the Supreme Court say, such settlements are obligatory unless protested against; and, therefore, nothing is gained by discussing the question under the form of whether they were unascertained or liquidated duties, as the solution of it depends at last on the question whether the failure to protest is a bar to a claim here as well as in the courts and in the department.

The legality of duties never tried on claim for balance due for "unascertained duties."

That this is the real and only question is also shown in the opinion of Chief Justice Taney, delivered in the circuit court, in the case of Marriott and Brune, where, as appears by the statement of the case in 9 H. 619, there had been a failure to protest as to part of the payments, and an attempt made to excuse the failure on the ground that the payments were made before the facts which formed the ground of protest were known, or before the duties were ascertained, as was attempted in the argument here of the case of Sturgess, Bennett & Co., in this Court. But Judge Taney said:

"*The protest is not required to be made on or before the payment of what are called the estimated duties;* for this payment is necessarily regulated by the invoice quantity as well as the invoice price. The importer cannot at that time know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"*The payment is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice,* as it warns the collector, before he renders his

account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"*The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment;* for it remains in the hands of the proper officer subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer and is returned to him." The Supreme Court say: "But where the duties had not been closed up in any cases, when the written protest, in April, was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid *Because, till the final adjustment, the money remains in the hands of the collector and is not accounted for with the government, and more may be necessary to be paid by the importer.*"—(Brune *vs.* Marriott, 9 H. 636.)

This shows distinctly that what are called payments on account of *unascertained or estimated duties* are not in fact payments, but that they are *deposits* or *pledges* which are made on every entry; and that whilst the importer is not bound to protest till the exact amount required of him is determined, if he were not then required to protest in case his money, or any part of it, was retained, when he regarded such retention as illegal, the statute, which was intended to require objections to the rates and assessments of duties to be made promptly, or to preclude them altogether, would be, to all intents and purposes, a dead letter.

But it seems to be supposed that, prior to the act of 1839, a suit could be maintained to try the legality and validity of the demand and payment of duties, as well when protested against as when not, because then a suit could be maintained against the collector for over-payments on account of unascertained duties, and for duties paid under protest. But that is a mistake; over-payments for unascertained duties could not be recovered then any more than now, when retained as part of the money due the government, according to the established rates and assessments, unless such retention had been protested against on settlement. It was only for a balance not due to the government, according to the computation and rates demanded, and therefore remaining in the hands of the collector as money had and received to the use of the importer, and on which the government had no claim, that he could be sued when no protest had been made. The act of 1839 passed all sums received in his official capacity into the treasury, and was construed to preclude all suits against the collector; but the act of 1845 restored the right of action to the full extent it had previously existed, "to ascertain and try the legality and validity" of disputed payments. And the right to sue the collector for an over-payment, admitted to be such and not claimed as due to the government, was well exchanged for the prompt return of the money from the treasury by the proper officer on settlement of the account.

The case at bar, as stated in the petition, is a case in which, according to the decisions of the Supreme Court, there ought to have been allowances made in the final adjustment of the duties corresponding to the actual deficiencies ascertained by gauging in the quantity of

bandy imported, but which were not made, not from ignorance of the facts, but from the construction of the law then made by the Secretary; and were therefore claimed, on the settlement for duties, as part of the sum due the government; and the amount now claimed was not a balance found due on such settlement or ascertainment of duties which remained in the hands of the officer, to be refunded in the manner described in Judge Taney's circuit court opinion; it was for such balances or payments, on account of unascertained duties, for which suit would lie against the collector prior to 1839, and for which a claim might be preferred now against the government, without protest having been made. But it would be a confounding of terms and of things to speak of the claim made in the petition as a claim for the balance of such an account. It is a claim in fact against the settlement, and contesting its illegality—assuming the right to do so in this Court, although there was no protest which would enable the claimant to make such contest in other courts. But whether the Court sustain the claim or not must depend on the question, whether a protest by the claimant was necessary to invalidate the settlement in a claim made before this Court, as it was in a claim made before the Supreme Court. And it is begging the question to assume that the settlement was no settlement, and that we are at liberty now to treat it as if it never had been made, and consider the payments as made on account of unascertained duties, because, whether it may be so treated depends on the question, whether a protest was necessary or not to prevent the settlement from being conclusive.

The act establishing this Court does not repeal the law requiring protest to make over-payments "illegal exactions."

The question, therefore, of the materiality of the protest cannot be evaded. It must be decided whether a claimant is entitled to recover on a case before this Court, when he would not be entitled to recover in the same case against the officer representing and acting for the United States, who is by express law permitted to be sued in order to try the legality and validity of the same proceedings, the legality and validity of which are drawn in question here. It would hardly seem to be necessary to do more than state such a question, if the decisions of the Supreme Court are to be regarded as obligatory on this Court as the true exposition of the law.

It is true that a distinction is asserted to exist between the law applicable to a suit against a collector and a claim preferred against the government on the same account, but I apprehend there is no difference of which a court or any power governed by legal principles could take notice.

Could it be said that one may have a legal claim against the government when he has no legal claim against an officer who is subject to be sued for every legal claim against the government? The act of '45 authorizes a suit against the collector in every case where the legality and validity of the demand and payment of duties are contested, and the suit there authorized is as much a suit against the United States as this: the difference being merely that the government is there rep-

resented by the collector and district attorney, and here by the Solicitor; neither the collector, or attorney, or Solicitor having the money sued for, having any personal responsibility, or bearing any expense connected with the litigation.

The requirement of a protest as an essential condition to the maintenance of the action, is not a provision adopted out of regard to the collector, or for his protection, but is a provision intended to define and fix the legal rights of the real parties to the transaction, expressed in the language commonly used in statutes for that purpose. The object of the statute was to restore the right to appeal to the judiciary for the interpretation of the revenue laws on all contested points, which had been unintentionally taken away by the act of 1839; and it was an appropriate place to add the provision requiring the protest to be in writing, which experience had shown to be necessary, and to define the essentials of a valid protest, to wit: that it should be made at the time of payment, and state the objections relied on.

If the statute regulated the relations of individuals, no one would suppose that a legal right subsisted when the law took away the right of action in such case. Here the law is regulating the r ghts between individuals and the government, and, for the purpose of having them adjudicated, authorizes suits to be brought against the government, which, for that purpose, is represented by the collector. Why should not the statute be as conclusive of the legal rights of the parties in the one case as the other, as respects its subject-matter?

In a circuit court opinion, Judge Taney speaks of the object of this statute, and the relation of the United States to the suits it contemplates, in these words:

"Now, the act of February 26, 1845, in express terms provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objection when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes the protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers,

and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected, before the duties were exacted; but it is now too late. And if this oversight be fatal to this appraisement. and renders it invalid, then the public lose, not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States."—(Case of Mason & Tullis *vs.* Kane.)

Does not the reason of the statute, as shown in the opinion of the chief justice, make it equally applicable to a claim against the United States on account of overpaid duties, however and wherever it is presented against the government?

Take the case considered in this opinion where the appraisement made was not in conformity to law, because the appraisers did not view the article. Is there any reason why the statute should not apply to an attempt to invalidate that appraisement in this Court; and could this Court say that the appraisement was invalid on proof that the appraisers did not view the article?

What reason is there for supposing that Congress, in establishing this Court, repealed the law heretofore enacted which devolved the duty of construing the revenue laws on the Secretary of the Treasury, and legalized his construction, unless it was contested by specific protest in writing? It is certain that such was the law declared to be in force by the Supreme Court when this Court was established, and that it was expressly decided that no duties paid under such construction by the Secretary were illegally demanded and paid, unless protested against.

But it is supposed that the language used by the Supreme Court, when it says, "when no protest is made the duties are not illegally exacted in the legal sense of the term," means no more than that without a protest no action can be maintained.—(See p. 13, Op. in Beatty's case.) And the concluding remark of the judge in Mason and Tullis *vs.* Kane, when he says, "If improperly charged, it is no doubt yet in the power of the administrative department to do justice

to the claimant, but no action can be maintained under the act of 1845," is quoted (p. 17) in support of this view.

I have already endeavored to show that the purpose of the explanation given by the Supreme Court of the effect of the decision in the case then before them, (Caswell's) and of the former decision in Brune's case, was not to show that a protest was necessary to enable a party to maintain a suit—or on that point the statute was express, and no explanation could make it plainer—but to show that over-payments without protest were not illegal exactions within the meaning of the act of 1846, authorizing reclamations on the treasury; nor does the remark in Mason and Tullis—that the administrative department might yet do justice in that case, but no suit could be maintained, referring probably to the power of the department to set aside appraisements if not legally made, as was alleged in this case, and order a new appraisement, (see General Regulations, No. 63, title Appraisement) at all conflict with this view or help the conclusion that it would be competent for any court of law to recognize a class of claims which the department, as well as the courts, is expressly forbidden to allow by the act of 1845.

Character of these payments on common law principles.

But the decision in Caswell's case does not proceed merely on a construction of the act of 1845 and 1846. It declares that duties paid without protest are not recoverable on general principles. "For," says the court, "the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation; and if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question. Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted, nor are duties illegally exacted when they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunal by a proper and legal protest; nor are they within the principle decided by the court in the case before us.

In commenting on this language, this Court, in the opinion in Beatty, (p. 14,) says:

"The remarks which refer to the decision of the Secretary of the Treasury are to be explained in the same way as those which we have already particularly noticed;" [that is, that the duties demanded and paid without protest were not illegally exacted, so as to enable the party to maintain an action in the courts. I refer to what I have previously said, to show that the views of the Supreme Court were not so limited.] "And, moreover, it was not the intention of the Supreme Court to characterize the decision of the Secretary of the Treasury as a judicial decision; for no part of the judicial power, under the Con-

stitution of the United States, can be conferred upon an executive officer. Every ministerial officer is obliged to make a decision, in the first instance, in every case in which he is called upon to act.

"If the act which he is required to do be executive, and not merely ministerial in its character, his decision is final as regards executive action and no appeal lies from it to the courts, nor can they revise his judgment.—(Decatur *vs.* Paulding, 14 Peters' R. 497; Bradshear *vs.* Mason, 6 Howard R. 92.) But it is not conclusive upon the rights of the party interested, in the sense in which a judicial decision would be. He would still be entitled to appeal to Congress. - (14 Peters' R. 522; Reeside *vs.* Walker, 11 Howard, R. 272)

"It was such a decision, on the part of the Secretary of the Treasury, to which the chief justice referred; and all that he meant to say was, that if the importer does not appeal from it to the judicial tribunals, in the manner prescribed by the act of 1845, he cannot maintain an action under that act against the collector; but, in the sense of that act, the duties are not illegally exacted."

It will not be contended, that the effect of the failure to protest and appeal to the judicial tribunals precluded an appeal to Congress. Whether the action of the Secretary of the Treasury be characterized as judicial, executive, or ministerial, it did not take away the right to petition Congress. Nor would the decision of any court preclude the losing party from throwing himself on the generosity of his adversary. But the point under consideration is, what are the legal rights of the parties, and how are those rights affected according to the judgment of the Supreme Court, by the failure to protest? And when that court says the effect is the same as if the payment was made under the decision of an inferior court, without appeal, it means to characterize the payment as a voluntary payment.

That this is true, is manifest from the least consideration of the relations of the parties. The collector has the right to hold possession of imported goods till the duties are paid, as the law requires. What the law requires, the Secretary is bound to instruct the collector. The Secretary is the head of the financial department, and represents the government; the collector is a ministerial agent to do his bidding. The rates he demands by order of his superior are paid without objection. Is the case different in principle from the payment of rent, without objection, to an agent under instructions from the landlord, on an agreed construction of the rates under a lease, of which both parties have a copy, but in which construction the courts may afterwards differ from them on a question raised by some other tenant on a similar lease? *Ignorantia facti excusat, ignorantia juris non excusat,* is the maxim of the law, and the most common illustration of the latter part of it is found in cases like the present, where money has been demanded by one party, and paid by the other without question, on a construction of law by both parties, which the courts do not sanction when the question is raised. Thus, when money is paid with full knowledge of the facts, though there be no debt, it cannot be recovered back.—(Cadavil *vs.* Collins, 4 A. & E. 866.)

And when an underwriter, having paid a loss, sought to recover it back on the ground that a material circumstance was conceded—it ap-

pearing that he knew it at the time of the adjustment—he could not recover, although it would have been a defence if he had not paid.—(Bilbie *vs.* Lumley, 2 East., 469. See also Gomey *vs.* Bond, 3 M. & S., 378; and Lothian *vs.* Henderson, 3 B. & P., 420. So also of an allowance made on settlement of an account. Skyrving *vs.* Greenwood, 4 B. & C., 281; Bampston *vs.* Robbins, 4 Bing., 15; Shaw *vs.* Picton, 4 B. & C., 715.) Authorities without number might be cited, but the point is expressly ruled by the Supreme Court, not only in Caswell's case, but in Elliott *vs.* Swartwout, 10 Peters, 153, decided in 1836, before the statute relating to protest was enacted. In this case the court say:

"The case put in the second point is where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States. The manner in which the question is here put, presents the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is therefore to be considered as a voluntary payment, by mutual mistake of law; and in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each presumed to know it. Any instructions from the Treasury Department could not change the law, or affect the rights of the plaintiff. He was not bound to take and adopt that construction. He was at liberty to judge for himself, and act accordingly. These instructions from the treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this that the party cannot sue the United States. The case put in question is one where no suit would lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right.

"The case of Morgan *vs.* Palmer, 2 Barn. & Cres., 729, was an action for money had and received, to recover back money paid for a certain license; and one objection to sustaining the action was, that it was a *voluntary* payment. The court did not consider it a voluntary payment, and sustained the action; but Chief Justice Abbott and the whole court admitted that the objection would have been fatal if well founded

in point of fact. The court said it had been well argued, that the payment having been voluntary, it could not be recovered back in an action for money had and received. And in Brisban *vs.* Dacres, 5 Taunt., 154, the question is very fully examined by Gibbs, Justice, and most of the cases noticed and commented upon, and with the concurrence of the whole court, except Chambre, Justice; he lays down the doctrine broadly, that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily, he cannot recover it back. It may be, says the judge, that upon a further view he may form a different opinion of the law, and it may be his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise. There are many doubtful questions of law. When they arise, the defendant has an option either to litigate the question, or submit to the demand and pay the money. But it would be most mischievous and unjust if he who has acquiesced in the right, by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

See also 10 H., p. 256, where it was contended that a payment was voluntary because the merchant had elected to pay the excess rather than be subjected to a penalty, but protested at the same time against it. Elliott's case was cited for the United States, but the court properly distinguished it from the case before them, and say: "Indeed it seems sufficient to sustain the action, whether under the act of February 26, 1845, or under the principles of the common law, if the duties exacted were not legal, and were demaned and paid under protest."

This Court has so far adopted and followed these opinions as to say (p. 9, opinion in Beatty's case:) "It is true that the failure to make any objections to the payment, or, in other words, to make a protest, might have afforded evidence that the payment was voluntary; but according to the principles of the common law which governed the action, the failure to protest could have had no other legal effect or operation upon the question of the 'legality and validity' of the 'demand and payment' of the duties."

On the opinions cited, I feel warranted in contending that the failure to protest, or, in other words, the failure to perform the condition annexed by law, drawing in question the "legality and validity" of these payments, was not only *evidence* that such payments were voluntary, but *conclusive evidence.* As, however, the failure is stated in the petition, and nothing is stated to rebut the presumption arising from it, it must be deemed by this Court a voluntary payment. Voluntary payments *a fortiori* not recoverable from the treasury.

All the reasons which preclude a recovery of money paid voluntarily to an individual are equally applicable to money paid into the public treasury; and many considerations besides, particularly that the money so paid is expended for public purposes; and that no suspicion of bad faith, or any circumstance tending to show that it was unconscientiously obtained, can be imputed, whilst the mischief which would flow from the application of a contrary doctrine are much greater and more serious.

The class of cases now before the Court, which seek to have a readjustment of duties paid on imported liquors, &c., for five years, and the repayment to the importers of large sums which they have long since received from the consumers, strikingly illustrates the mischiefs of such a doctrine. They received back from the people the differences here sought, in the same manner in which they collected the rest of the duty paid by them, and if they have a title to the differences now, it is not impossible they may have an equal title to the balance of the duty hereafter; nor can it be foretold where these reclamations will stop, as any irregularity in collection or appraisement will equally entitle the importer to the return of the duty.

M. BLAIR.

DAVID WOOD *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

This case, in its principal features, is similar to the case of Sturgess, Bennett, & Co., recently decided by this Court, and the principles adjudicated in that case have been reargued in this. The object was to bring those principles in review in this case, to be reconsidered, and again passed upon by this Court, in order that, if we should find that our views were in any respect incorrect or unsound, the error may be corrected.

In the case of Sturgess, Bennett & Co, it was held that, where brandy or other liquor is imported into the United States, under the tariff act of 1846, and the estimated quantity on which duties are paid by the importer exceeds the actual quantity, there is an implied promise on the part of the United States to repay to the importer the duties upon such excess, and they may be repaid by the Secretary of the Treasury under the act of March 3, A. D. 1839; and if such repayment be not made, the importer is entitled to relief in this Court.

According to the practice which prevails in the custom-houses, after the estimated duties are paid, steps are taken by the proper officers, under instructions from the Secretary of the Treasury, to ascertain the duties actually imposed by law; and it is insisted that, if upon this adjustment no excess over the estimated quantity appears, and before or at the time of its completion no protest is made by the importer, notwithstanding there may be in fact an excess, and that excess shown by the official return of the gaugers, still the duties thereon are not illegally exacted. To mitigate the apparent harshness of this proposition, the attempt is made to support it on the ground, that until the adjustment is completed, no payment is actually made, and the failure to make the protest renders the payment voluntary. This doctrine, it is insisted, is sustained by the decisions of the courts of the United States.

The acts of Congress in terms require, that the estimated duties on goods not warehoused shall be *paid* before a permit for landing them shall be granted.—(1 Stat. at Large, p. 664, section 49; 1 Ibid., p.

673, section 62; 9 Ibid., p. 53, section 1.) But, notwithstanding this express language, it is supposed that this is not a payment, but something rather in the nature of a pledge or deposit than a payment, and the language of Mr. Chief Justice Taney, in the case of Brune *vs.* Marriott, in the circuit court of Maryland, and of Mr. Justice Woodbury, in the same case, in the name of Marriott *vs* Brune, (9 How. R., 636,) has been cited in support of this doctrine. The language referred to for this purpose is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties; for this payment is necessarily regulated by the invoice quantity as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made, when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible, if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him.—(Per Taney, C. J., in Brune *vs.* Marriott.)

"But where the duties had not been closed up in any cases, when the written protest, in April, was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer."—(Per Woodbury, J., in Marriott *vs.* Brune, 9 How. R., 636.)

In order correctly to understand this language, it may not be improper to refer to the second section of the act of 1839. It is as follows:

"That from and after the passage of this act all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the said Treasurer, kept and disposed of, and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the said Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to

draw his warrant upon the Treasurer, in favor of the person or persons entitled to the over-payment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated." —(5 Stat. at Large, p. 348–'9.)

Taking this act in connexion with the remarks of the learned judges above quoted, it is apparent that no case could be selected which would more clearly show that justice to every judge requires that his remarks in a case should be referred exclusively to that case itself; for otherwise he will be often understood to express views which had never entered his mind. It will not do to understand Mr. Justice Woodbury, literally, and as asserting a general proposition, when he says: "Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." The statute expressly requires that it—the very money paid for unascertained duties—shall be placed to the credit of the Treasurer of the United States, and *shall not* be held by the collector, to await *any* ascertainment of duties. It also expressly requires that the money shall be kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be kept and disposed of. And, moreover, the only mode prescribed by the act in which any excess of duties beyond what the law requires can be repaid to the importer is under a warrant from the Secretary of the Treasury upon the Treasurer. So that, immediately upon the payment of the money, it passes into the treasury of the United States. It is too plain to admit of question that Mr. Justice Woodbury did not mean to assert anything in conflict with these unequivocal requirements. The question before the court was, whether, under the act of 1845, a protest made at or before the final adjustment of the duties in the custom-house was sufficient. To that question, and to that alone, the court is to be considered as having addressed itself; for there is no judge who would not regard it as an act of injustice that his remarks in any case should be referred to any other standard. It is not possible for the human mind to be sufficiently circumspect to guard against error, if a broader responsibility should be imposed. The court decided—and upon that point there can now be no difficulty—that *the payment* contemplated by the act of 1845 is not made until the adjustment of the duties is completed. It was to this point that the remarks of Mr. Justice Woodbury were directed, and justice to him, as well as to truth, requires that they should be circumscribed and limited by it. In like manner, Mr. Chief Justice Taney, in saying that "the payment is legally made when the duties are finally determined, and the amount assessed by the collector," is surely not to be understood as asserting that the payment of unascertained duties is *not* legally made, because the law in express terms requires it to be made. All that he meant to say was, that the payment of duties, in the sense of the statute of 1845, is made when the duties are finally adjusted. In using the words "legally made," he merely meant "according to the act of 1845." In the case of Cary *vs.* Curtis, (3 How. R., 236,) where the character of the payment of estimated duties came more directly in question, it is treated and considered not only

as a *payment*, but as a payment into the treasury of the United States, and the collector is spoken of as the mere bearer, (3 How. R., 241 ;) the mere instrument for the transfer (3 How. R., 249) of the money to the treasury of the United States.

And so Mr. Chief Justice Taney, in saying that "payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment," must be understood as addressing himself to the case before him. He did not mean to assert the general proposition that such a payment is not a payment in any sense. He was laboring to show that it was not the payment to which the act of 1845 refers. The object was to ascertain the interpretation to be put upon that act. The payment of unascertained duties is a payment—he so calls it; but then he suggests, it is not final—all that the collector has to do in connexion with it has not been done until the duties are finally adjusted. It was as if he had said that the statute, in requiring the protest to be made "at or before the payment" of the duties, meant that it should be made at or before the final adjustment of them at the custom-house. This construction is inferred in part from the consideration that the action mentioned in the act of 1845 is an action against the collector. And it is apparent that if this construction had not been given to that act, it would, to a great extent, have failed to answer the purposes for which it was enacted. The instances in which protests would have been made, at or before the payment of the estimated duties, would, in all probability, have been rare. A liberal interpretation of it was wisely adopted by the Supreme Court in order to carry out the intention of Congress, and to render the privilege which it gave, of a suit against the collector, of some practical value.

But what does the learned chief justice mean in saying that "the payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment"? He has given his own explanation: "For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." The same view of the subject is somewhat more fully expressed by this Court, in the opinion of the Court in the case of Sturgess, Bennett & Co. *vs.* The United States, as follows: "So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are to some extent imposed and payable in the particular case, but that the true amount is unknown and undetermined at the time of payment. The law, in its requirements upon this subject, looks both to the security of the United States and to the interests of the importer. The just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands and nothing more; and the payment is made under an implied contract on the part of the United States that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer."

It seems to us, therefore, that the authority relied upon to show that when money is paid for estimated duties it is not a payment, wholly fails to support that proposition. It is indubitably clear that the point did not arise in the case referred to, and was not discussed by the judges. It is equally clear that it is a payment. It is made on account of a debt due by the importer to the United States at the time of its payment, and though not then ascertained, yet capable of ascertainment from elements then in existence. It is made not only according to law, but in obedience to the express requiremints of law. It is not, therefore, in its nature a voluntary payment, *i. e.* it is in no sense a gift to the United States. If it is at any time to be so regarded, it becomes so by matter *ex post facto*. It is not of that character at its inception—at the time is it made. On the contrary, it is conceded that it is made under such circumstances, that if more is "paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." The overplus is returned to him under an implied contract on the part of the United States to return it to him. The very money paid by him is not returned, as would be done if it had been a mere pledge or deposit, but an equivalent amount. The actual money paid under the express requirements of the law, passes directly and immediately into the treasury of the United States, and is there mingled with other money received for duties, and kept and disposed of as such other money is kept and disposed of. The repayment, therefore, is made in discharge of a contract on the part of the United States to make it, and not as the return of a pledge or deposit. Such a return has become wholly impracticable, for the very money paid cannot be separated or distinguished from any other money belonging to the United States. That money became, by virtue of the law under which it was paid, the property of the United States, and to say that it belongs to the importer is but a mode of expressing the obligation of the United States to repay it.

If this be the correct view of this subject—and that it is, there does not seem to us to be any room for doubt—the contract of the United States to repay the excess to the importer is like any other contract, into which they enter, and to be governed by the same principles; and it certainly cannot be necessary to cite authority to show that, in general, those principles are the same which prevail between individuals. If such a contract existed between individuals, how could it be discharged? We need not repeat here the various modes known to the law, by which this can be done. The ground on which it is claimed here to have been done, is that the money due under that contract has been voluntarily given to the United States, by the failure to make a protest at or before the final action of the collector in the adjustment of the duties. It must be recollected that this view is presented on common law principles—the principles which govern contracts between man and man. Whether the statute law gives the failure to make a protest the effect claimed for it, is another question. But according to the principles which govern contracts between man and man, a *gift* of what is due on a contract cannot be made to the person who owes it, otherwise than by a release under seal. Mention is sometimes made of releases not under seal; but

they are ineffectual, without a consideration to support them. Even if part of the debt be paid, and the creditor give a receipt, expressing that the money is received in full of all demands, still the obligation to pay the balance will remain wholly unaffected, unless there be some additional consideration to discharge it.—(Co. Litt., Thomas' ed., 452; Bac. Abr., "Release," A.; Cordwent *vs.* 8 Hunt, Taunt. R., 596; Preston *vs.* Christmas, 2 Wils. R., 86; Lodge *vs.* Dicas, 3 B. & Ald. R., 611; Fitch *vs.* Sutton, 5 East. R., 230; Whitehill *vs.* Wilson, 3 Penn. R., 405.) A contract to pay money upon an executed consideration must be satisfied or released. The failure to make a protest is neither a satisfaction nor a release.

But it is supposed that the Supreme Court of the United States, in the case of Lawrence *vs.* Caswell, 13 How. R., 496, held that where money is paid for duties without a protest, the payment is voluntary. The language from which this is inferred is as follows: "For the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us."—(13 How. R. 496.)

Our views as to the meaning of this language were presented in the case of Beatty's Executor *vs.* the United States, and we have found no reason to change them. We consider, too, our remarks upon the language already quoted from the opinions of Mr. Chief Justice Taney and Mr. Justice Woodbury, in Brune *vs.* Marriott and Marriott *vs.* Brune, as applicable here. In assimilating a payment of duties without a protest, to the payment of money under the decision of an inferior court, without appeal, the Supreme Court merely meant to say, that a payment of duties without a protest left the importer without a legal remedy in the judicial tribunals. That Court did not intend to say that the rights of the importer were concluded by the decision of the collector, sustained by the Secretary of the Treasury, to the same extent in all respects as they would be by the judgment of an inferior court. To have gone thus far, would have rendered the remarks of the learned chief justice extra-judicial; for the point was neither involved in the case nor necessary to illustrate the question under discussion. And, moreover, such a doctrine cannot be sustained. Under the act of 1839, it is made the duty of the Secretary of the Treasury, whenever it shall be shown to his satisfaction, that, in any case of unascertained duties, more money has been paid to the collector than the law requires should have been

paid, to cause it to be refunded to the importer. In determining this question, the Secretary of the Treasury is not confined to the decision of the collector, though it may have been made under his instructions. The language is general: "Whenever it shall be shown to the satisfaction of the Secretary of the Treasury." No matter, then, how the error may be shown if it be shown to his satisfaction, the Secretary of the Treasury must cause the money to be refunded. And so, under the old system, where it was sufficient, in order to obtain a permit to land the goods, to secure the payment of the duties, and credit was given, the condition of the bond was to pay "the sum of ———, or the amount of the duties *to be ascertained* as due."—(1 Stat. at Large p. 675.) Can it be pretended that, in an action on such a bond the importer would be concluded by the adjustment made by the collector? Such an idea, we suppose, was never entertained. And, again, under the present system, where goods are warehoused, the condition of the bond prescribed by a regulation of the Treasury Department is, to pay "the sum of ——— dollars $\frac{}{100}$, or the amount of the duties *to be ascertained* as due and owing on the aforesaid goods."—(Mayo's Synopsis, p. 331.) If, in such a case, after the final adjustment made by the collector, the importer should tender a less sum than the amount appearing to be due upon such adjustment, but the sum actually imposed by law, and it should be refused, and thereupon an action of detinue should be instituted against the collector for the recovery of the goods, would it be a sufficient defence, excluding all further inquiry, to show the adjustment made by the collector? We suppose that no one would pretend that such a doctrine could be maintained. If, then, the adjustment of the collector, even when no protest is made, would not conclude the rights of the importer in any of the cases suggested, upon what principle could it have that effect, where money is paid for unascertained duties, and no protest is made at or before such adjustment is concluded? None can be suggested. We are entirely satisfied that the Supreme Court never intended to say, even *arguendo*, that a failure to make a protest renders the payment of unascertained duties a voluntary payment.

But it may be urged, that an application to the Secretary of the Treasury, under the act of 1839, is not an application to a judicial tribunal, and that in the other cases supposed, the one arising under the old, and the other under the present system, the right of the importer to redress before the judical tribunals, never depended upon a protest. All this we concede. It is true now, and such has always been the doctrine upon this subject, that the sole purpose and use of a protest or notice, in the sense in which we are now considering it, are to enable a party mispaying money to a collector or other agent, to appeal to the judicial tribunals against the collector or other agent; and that the failure of such party to avail himself of it, does not, and never did, affect his right to redress as against the principal. No change whatever has been made by any act of Congress as regards the protest in this respect.

We do not mean to say that no case can occur where the payment of duties, without a protest, would be voluntary. All that we mean to say is, that a payment of unascertained duties, where no protest is

made, is not for *that reason* voluntary; it is not so at its inception, and it does not become voluntary by reason of the failure to make a protest at or before the final adjustment of the duties made at the custom-house. This is the point before us, and we are not at liberty to go beyond it. The Supreme Court, in the case of Elliott *vs.* Swartwout, 10 Peters' R., 137, say, that where an excess of duties is paid to a collector, and by him in the regular or ordinary course of his duty paid into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him, it is to be considered a voluntary payment by mutual mistake of law; and, in such case, no action will lie to recover back the money. There can be no doubt that, in such a case, no action will, or ever would, lie to recover back the money against the collector. Whether it is to be considered a voluntary payment, by mutual mistake of law, is a question not necessary for us now to consider. We do not design to indicate whether we regard it as having been adjudicated in that case, or whether we approve or disapprove of it. All that we mean to say is, that this is not such a case. When such a case shall arise before us, we shall not hesitate to meet the responsibility of deciding it.

But it is supposed that the case of the United States *vs.* Clement and Newman, Crabb R., 499, is analogous to this case. The decision in that case was made in the form of an instruction to the jury, and merely conformed to the doctrine stated by the Supreme Court in the case of Elliott *vs.* Swartwout, which we have already noticed. An action of debt was brought on a custom-house bond, and the defendant relied on a set-off for money paid for an over-charge of duties on a previous importation. It is not expressly stated that the set-off was for a payment made in discharge of a custom-house bond, but the importation occurred under the credit system, and the report states: "The defendants claimed to set off against the demand of the United States both one half of the sum of $131 61, alleged to be an overcharge on this importation, the present bond being for one half of the gross duties, and also the sum of $345 22, being an alleged overcharge, *under similar circumstances*, paid by them on a former occasion." It is apparent, therefore, that, as regards the question now under consideration, the point decided merely was, that where money is paid *voluntarily*, by mistake of law, in discharge of a custom-house bond given for duties not imposed by law, it cannot be recovered back. Whether this decision was rightly made is a question which it is not either necessary or proper for us now to consider, simply for the reason that this case is wholly unlike the case of the United States *vs.* Clement and Newman. Here, the claim is for money paid for estimated duties beyond the amount actually imposed by law. It was paid in obedience to the express mandates of the law, and an objection to the payment at the time it was made would have been ridiculous and absurd. As the importer did not intend to warehouse his goods, he could not even have landed them, much less have obtained possession of them, without the payment of the estimated duties. He had but one course to

pursue. The payment was not a matter of choice, but of necessity. There was no escape from it. The law commanded it. And, moreover, so far from being able to ascertain to what extent the estimate was erroneous, he had no means of detnrmining whether it was erroneous at all. This depended upon the return of the weighers and gaugers, and the law did not permit them even to begin their work till after the estimated duties were paid. But in the case of the United States *vs.* Clement and Newman, the payment was made in discharge of a custom-house bond long after the weighers and gaugers had made their return, and when all the *facts* were ascsrtained and as well known as they were at the time of the trial. It might have been true that the payment was *voluntary*, and if it was, the money, in the opinion of the judge, could not be recovered back. But it cannot be true, either in fact or in law, that the payment of estimated duties is *voluntary* in the technical sense of that term.

Whilst it is conceded that prior to the act of 1839 an action might be maintained against a collector for money paid for unascertained duties, exceeding the amount actually imposed by law, where no protest was made, still it is urged that this could be done only where upon the final adjustment by the collector, an excess was ascertained, and remained in his hands, without being paid into the treasury of the United States. This notion has arisen from a misconception of the object of a protest. That object, as stated in all the cases, was merely to warn the collector that the party means to hold him personally responsible for the money. It was by this means that he secured his right to appeal to the judicial tribunals against the collector. It involved no new principle, nor was it peculiar to the case of an importer and a collector. It is well known and understood in the law of agency. The principle there is, that where money is paid to an agent for his principal, under such circumstances as would entitle the person making the payment to recover it back from the principal, if it had been directly paid to him, a suit may be maintained therefor against the agent, if, before he paid the money to his principal, notice was given to him that it would be reclaimed from him. The notice does not create the right to recover back the money; that results from other circumstances. The notice is necessary, only because the agent is not liable in an action by the person who has mispaid the money, if he has paid it over to his principal without the notice. The reason is, that it is just that one man should not be the loser by the mistake of another; and the person who made the mistake is not without his redress, but *has his remedy over against the principal.* And hence it is that if it has not been paid over, but remains in the agent's hands, it may be recovered back even without notice. In such cases the action against the agent will be considered as if it were an action against the principal, and determined on the like principles.—(Buller *vs.* Harrison, Cowp. R., 566; Burrough *vs.* Skinner, 5 Burr. R., 2639; Cox *vs.* Prentice, 3 M. & S., 348; Pond *vs.* Underwood, 2 Ld. Raym. R., 1210; Cary *vs.* Webster, 1 Str. R.. 480; Saddler *vs.* Evans, 4 Burr. R., 1986; Stevenson *vs.* Mortimer, Cowp. R., 806; Greenway *vs.* Hurd, 4 T. R., 554; Hearsey *vs.* Pruyn, 7 Johns. R., 182; Ripley *vs.* Gelston, 9 Johns. R., 309; Elliott *vs.* Swartwout, 10 Peters' R.,

137; Marriott *vs.* Brune, 9 How. R., 419; Maxwell *vs.* Griswold, 10 How. R., 255; Cary *vs.* Curtis, 3 How. R., 236.) And to the same effect are the text writers.—(Paley on Agency, by Lloyd, 389, 392; Story on Agency, §§ 300, 301, 307; 2 Liv. on Agency, edition of 1818, 260, 261.) The right to recover against the principal does not, and never did, depend upon the giving of notice to the agent. It is apparent, therefore, that the right to recover against the collector, money paid for unascertained duties to a greater amount than was imposed by law, was not, prior to the act of 1839, restricted to the excess ascertained by the adjustment made by the collector.

The solicitor supposes that, in the case of Lawrence *vs.* Caswell, 13 How. R., 488, the Supreme Court undertook to settle the construction of the act of 1846, (9 Stat. at Large, p. 44,) and held that, where no protest is made, duties are not illegally exacted in the legal sense of the term. This point was not discussed in the opinion of the court in the case of Sturgess, Bennett & Co. *vs.* The United States, but it was noticed in the opinion of the court in the case of Beatty's Executor *vs.* The United States. We there expressed the opinion that the Supreme Court merely meant to declare that, to maintain an action against the collector, the act of 1845 requires a protest, stating specially the grounds of objection, and, in the sense of that law, there can be no illegal exaction without such a protest. Our reasons for this opinion are there given at length. We have carefully reconsidered them, and find no reason to change the views there presented. The Supreme Court is purely a judicial tribunal, and nothing could detract more from the high character which it has justly attained in the United States, or tend more to impair confidence in its decisions, than the idea that it could be induced so far to transcend its legitimate powers, in any case, as to do more than decide *the very case* submitted to it. It is true that, in presenting its views of the case decided, it may with propriety draw its arguments from any source of which, in its discretion, it may approve. But no motive of public policy can be strong enough to justify or excuse that, or any other court in the United States, where the executive, legislative, and judiciary departments of the federal as well as of the State governments, are most sedulously kept separate and distinct, in attempting, by a decision in one case, to lay down rules to be followed in any other case not of a similar character with the one decided. In making a decision in one case, no court can rightfully undertake to do more than merely decide *that case.* Its decision, by virtue of the principle which gives value to a judicial precedent, may be followed, and, where it is the court of the last resort, in most instances ought to be followed in other cases. This is done, not because the Court so orders, but by reason of the merits of the decision as a judicial precedent. It is upon this ground that the decisions of the highest courts become authoritative, and are regarded as evidences of great principles. The Court is required to give its attention to the particular case before it exclusively, and it is because it is presumed to have done so that its decision attains to the dignity of a precedent. It is with no less pride than pleasure that we feel ourselves authorized to say that no court on earth has ever manifested

a more sacred regard for these principles than the Supreme Court of the United States.

The construction of the act of 1846 was in no way involved in the case of Lawrence *vs.* Caswell, and it is not to be presumed that the Court had it in contemplation. It was not cited either by the bar or the Court. The merits of the case could be in no respect affected by it, no matter what might be its construction.

The solicitor suggests that this Court was mistaken in saying, in the case of Beatty's Executor *vs.* The United States, that prior to the act of 1845 it was not necessary to state the grounds on which the protest was made. We regarded this as a principle about which there could be no doubt, and therefore cited no authority in support of it. It will be found fully sustained by the cases which have already been cited. In the case of Swartwout *vs.* Gihon, 3 How. R., 110, the notice to the collector was merely that the duties charged would be contested. It is true that the point in that case was, whether it was necessary that the notice should be in writing; but if it was necessary to state "the grounds of objection," it was fatally defective for that reason, and it is difficult to conceive why it was not objected to on that account upon any other reasonable hypothesis than that it was not regarded as defective for that reason. And, moreover, the Court say: "The *only* object of the notice was to *warn* the collector that the party *meant to hold him personally responsible* for the money, whether he paid it over or not."—(3 How. R., 110.) And such is the doctrine of all the cases. If, then, this was the only object of the notice, for what reason could it be necessary to state "the grounds of objection?" Before the passage of the act of 1845 no case can be found where any exception was taken to the notice for the reason that it did not state "the grounds of objection." Since its passage such an exception is common. If such an exception had previously been valid, how can it be accounted for that it was never taken? We adhere to the opinion that, before the act of 1845, it was not necessary to state in a protest "the grounds of objection."

We cannot but regret that the solicitor should have understood this Court to say, in the case of Beatty's Executor *vs.* The United States, that the act of 1845 was merely *declaratory*. We said: "That act was, *to some extent*, a declaratory statute;" and immediately added: "The Supreme Court, in the case of Cary *vs.* Curtis, had held that the act of 1839 took away the right of action against the collector; and the act of 1845, in substance, *declares* that it was not the intention of Congress that the act of 1839 should have that effect." We did not undertake to say that the act of 1845 was *declaratory* in any other respect. That, in our opinion, it imposed new terms upon the action against the collector, we explicitly state as follows: "As regards the action against the collector, the only essential change which the act of 1845 seems to have made, is, to require that the protest shall be 'in writing and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.' "

Whether the act of 1845 "is applicable as well to cases arising before as since its adoption," is a question which does not arise in this

case, and can now be of but little, if any, practical importance. It seems to us strange, however, that the solicitor should suppose that the provisoes of the second section of the act of 1846 refer exclusively to decisions under the act of 1845. The provisoes are as follows: "*Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction."—(9 Stat. at Large, p. 84.) This language is very broad, and indubitably embraces not only decisions under the act of 1845, but all other decisions of the courts of the United States, whether made under that act, or any other, and whether made before or after its passage. There are many reasons which will suggest themselves to every mind, why the natural meaning of the language used should be adopted in the construction of those provisoes; whilst not one, in our judgment, having any good foundation in justice, can be assigned for a more restricted meaning. The argument, therefore, urged by the solicitor against the remark made by this Court in the case of Beatty *vs.* The United States, that "the construction * * imputed to the Supreme Court, if adopted, would, in all probability, to a great extent, repeal the act of 1846," is wholly unsupported.

In the case of Lawrence *vs.* Caswell, 13 How. R., 496, the chief justice used this language: "The duty of 100 *per cent. ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount." In the opinion of this Court, in the case of Beatty *vs.* The United States, it is quoted to show that the learned chief justice, in the language which followed, designed to explain it. It does not seem to us to be any answer to our views to say, that no one ever supposed that a suit could be maintained, after the act of 1845, against a collector, without a protest, and that the express words of that act would seem sufficient to guard against such a possibility. This but shows that the explanation was the more necessary; for without it, even according to this view, the inconsistency of the language of the chief justice above quoted, with the *express words* of the act of 1845, would have been glaring and palpable.

Some stress was laid on this language used by the chief justice in Lawrence *vs.* Caswell: "Nor are they within the principle decided in the case before us." A more obvious proposition was never asserted, and it but strengthens the views which have been expressed by this court. The obvious motive of the Court was, that the actual decision made in the case should be understood. Too great care can never be bestowed on this point. What is the *principle* decided in the case of Lawrence *vs.* Caswell, as regards the matter of protest? That in cases like that, where there was an overcharge of duties, and the duties demanded were paid under protest, stating specially the grounds of objection, in the mode required by the act of 1845, an action can be maintained against the collector. And the Court are careful to exclude the conclusion, that any other case would be "within

the principle decided" in that case. They had already expressed the same idea, when they said: "When we speak of duties illegally exacted, the Court mean to confine the opinion to cases *like the present*, in which the duty demanded was paid under protest, stating specially the grounds of objection." By this they meant, not that there could be no case of an illegal exaction of duties, unless it was like that before them, but that their opinion was to be confined to such cases. It is as if they had said, "We do not mean to assert the general proposition that duties cannot be illegally exacted, except in cases like that now before us, nor that an action can be maintained against the collector in every case of an illegal exaction; but upon both points we *confine* our opinion to *cases like the present*, in which the duty demanded was paid under protest, stating specially the grounds of objection." And throughout the opinion, the Court, with characteristic caution, clearly show that they are not to be understood as doing more than deciding the very case before them.

We have carefully reconsidered the opinion of this Court in the case of Sturgess, Bennett & Co., in connexion with the points presented in the able argument of the solicitor, and find no reason to change it.

Let an order be made directing testimony to be taken in this case.

DAVID WOOD *vs.* THE UNITED STATES.

Dissenting opinion delivered by BLACKFORD, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition:

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor, ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the Court is, whether the petition shows a good cause of action. The decision of a majority of the Court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of Sturgess, Bennett & Co. *vs.* The United States, Beatty's Executor *vs.* The United States, and Spence & Reid *vs.* The United States, are referred to as a part of his opinion. In the examination of those cases, I became entirely

satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the Court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act* of 1845, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of Sturgess, Bennett & Co. *vs.* The United States, Beatty's Executor, *vs.* The United States, and Spence & Reid *vs.* The United States. The decision of the district court of the United States, above alluded to, is as follows:

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of $793, that sum being part of the duties charged on an invoice of molasses imported, by the defendants, from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of $345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument, that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said: Both our claims, for credit or set off, rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii,* and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843) charged the jury as follows:

"If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued that a payment to a public officer cannot be considered as a voluntary pay-

ment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased, his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs.—(United States *vs.* Clement and Newman, Crabbe's Reports, 499 to 515.)

In the case just referred to, as before stated, the United States were the plaintiffs and Clement and Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845, no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above mentioned case of the United States *vs.* Clement and Newman was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the

present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the Court in the present case.

The above are my reasons, in addition to those given in the cases of Sturgess, Bennet & Co. *vs.* The United States, Beatty's Executor *vs.* The United States, and Spence and Reid *vs.* The United States, for my dissent, in the present case, from the judgment of the Court.

IN THE COURT OF CLAIMS.

DAVID WOOD *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

In the years 1847, 1848, 1849, and 1850, the petitioner imported into the city of New York large quantities of brandy, rum, gin, and whiskey. The quantities stated in the invoices exceeded the quantities ascertained by the returns of the gaugers, but he was required to pay and did pay duties on the former. The excess of those duties over the duties legally chargeable on the quantities actually imported is the sum of two thousand one hundred and three dollars. See the statement certified by the collector, and countersigned by the naval officer of New York. The petitioner made no protest. He does not state whether the liquors or any of them were warehoused; nor is there any direct evidence before us on this point.

This case is, in principle, the same as the case of Sturges, Bennet & Co. Whether the liquors, or any of them, were or were not warehoused, is wholly immaterial; for in either event the duties on the liquors not imported were illegally exacted, and paid involuntarily. We refer to our opinions in the case of Sturges, Bennet & Co., and our former opinion in this case, for the reasons on which this opinion is founded.

We are of the opinion that the petitioner is entitled to relief, and we shall report to Congress a bill in his favor for the sum of two thousand one hundred and three dollars.

DAVID WOOD *vs.* THE UNITED STATES.

Judge BLACKFORD'S dissenting opinion:

I dissent from the judgment in this case.

The duties sued for were paid in 1847, 1848, 1849, and 1850. The ground of my dissent is, that the duties were paid without any objection, written or verbal.—(See 5 Stat. at Large, 727; Marriott *vs.* Brune, 9 Howard, 619, 636; Lawrence *vs.* Caswell, 13 Howard, 488, 496.) The dissenting opinions in Sturges, Bennet & Co. *vs.* The United States; Spence & Reid *vs.* The United States; Beatty's Executor *vs.* The United States; and Wood *vs.* The United States, 2 Rep. Court of Claims, pp. 58, 61, 63, 65.

A BILL for the relief of David Wood, merchant, of the city of New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to David Wood, merchant, of the city of New York, the sum of two thousand one hundred and three dollars, in full for excess of duties paid by him on importations of brandy, rum, gin, and whiskey, made by him into the port of New York in the years eighteen hundred and forty-seven, eighteen hundred and forty-eight, eighteen hundred and forty-nine, and eighteen hundred and fifty.

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 91.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

LUCRETIA WILCOX *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

LUCRETIA WILCOX *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Lucretia Wilcox, of the county of Wayne and State of Michigan, respectfully represents: That she is the widow of James Wilcox, deceased, who was an artificer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said James Wilcox subsequent to the 1st day of January, 1800, and has been allowed a pension, at the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Lucretia Wilcox, the widow of James Wilcox, deceased, an officer in the army of the revolution, the sum of $1,150, being for the arrears of her pension, at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

rate of two hundred and forty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress approved February 3, 1853, entitled "An act to continue half pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington county, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and District, J. J. Coombs, who made oath, in due form of law, that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

LUCRETIA WILCOX *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that there is evidence on file in the Pension Office that James Wilcox, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of two hundred and forty dollars per annum, commencing on the 3d of February, 1853, under the second section of the act of that date, entitled "An act to continue half pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Lucretia Wilcox, of Wayne county, Michigan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Lucretia Wilcox, the widow of James Wilcox, deceased, an officer in the army of the revolution, the sum of $1,150, being for the arrears of her pension, at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half pay to certain widows and orphans."

35TH CONGRESS, 1st Session. } SENATE. { MIS. DOC. No. 92.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Received and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HANNAH WEAVER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate from the Pension Office, transmitted to the House of Representatives.
3. Opinion of the Court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 21st day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

HANNAH WEAVER *vs.* THE UNITED STATES.

To the honorable the Court of Claims of the United States:

Your petitioner, Hannah Weaver, of the county of Wayne, and State of Pennsylvania, respectfully represents that she is the widow of Samuel Weaver, deceased, who was an officer in the war of the revolution, and who died prior to the 4th of March, 1848. She further states that she was married to the said Samuel Weaver subsequent to

the 1st day of January, 1800, and has been allowed a pension, at the rate of two hundred and forty dollars per annum, on account of the revolutionary services of her said husband, under the second section of the act of Congress, approved February 3, entitled "An act to continue half-pay to certain widows and orphans;" which pension was made to commence, by the decision of the Secretary of the Interior, on the 3d day of February, 1853, whereas your petitioner insists it should have been made to commence on the 4th of March, 1848. And she now claims that, by virtue of said second section of the act of Congress aforesaid, she is entitled to arrears of pension, at the rate aforesaid, from said 4th of March, 1848, to said 3d of February, 1853, upon which claim she prays the judgment of this honorable Court. She further represents that she is the sole owner of said claim, no other person having any interest therein.

J. J. COOMBS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
Washington County, } *ss.*

Be it remembered, that on this 26th day of May, 1856, personally appeared before me, the undersigned, a justice of the peace in and for said county and district, J. J. Coombs, who made oath in due form of law that all the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

N. CALLAN,
Justice of the Peace.

HANNAH WEAVER *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court:

This case is similar in principle to the case of Jane Smith *vs.* The United States, and the decision in that case settles the right of the present claimant to recover.

The evidence is contained in a certificate from Mr. Whiting, Commissioner of Pensions, dated February 3, 1857, in which he states that Samuel Weaver, her husband, died prior to the 4th of March, 1848, and that she is now in receipt of a pension of two hundred and forty dollars per annum, commencing on the 3d day of February, 1853, under the second section of the act of that date, entitled "An act to continue half-pay to certain widows and orphans."

We think the claimant is entitled to the arrears of her pension from the 4th of March, 1848, to the 3d of February, 1853, and we report a bill accordingly.

A BILL for the relief of Hannah Weaver, of Wayne county, Pennsylvania.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the

Treasury be, and he hereby is, directed, out of any money in the Treasury not otherwise appropriated, to pay to Hannah Weaver, the widow of Samuel Weaver, deceased, an officer in the army of the revolution, the sum of $1,180, being for the arrears of her pension at the rate of two hundred and forty dollars per annum, from the 4th of March, 1848, to the 3d of February, 1853, to which she is entitled under the second section of the act of February 3, 1853, entitled "An act to continue half-pay to certain widows and orphans."

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 93.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 17, 1857.—Read and referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CORTLANDT PALMER, Receiver, &c. *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Depositions offered by the claimant in support of the facts as claimed in the case, transmitted to the House of Representatives.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this sixteenth day of February, A. D. 1857. [L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

CORTLANDT PALMER, Receiver of the assets of EBENEZER WOOSTER and JOSEPH L. FRAME. *Claim* for duties illegally exacted on unbleached linens.

TO THE HONORABLE COURT OF CLAIMS:

The petition of Cortlandt Palmer, of New York, receiver, respectfully represents, that Sylvanus J. Leggett, Ebenezer Wooster, and Joseph L. Frame, formerly partners in business under the firm of Leggett, Wooster & Frame, in the months of January and February, 1836, imported from Liverpool into the port of New York certain un-

bleached linens, and made due entry of the same for consumption, and entered the same on free entries, and described the same on their entries as "brown linen drill," "brown linen embossed," "gray linen drills," "¾ brown linens," (words signifying unbleached linens and also the particular kinds of linens,) and on making entry of the same one of said firm made oath or affirmation, "That I have not in the said entry or invoice concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise." The officers of the customs erroneously classed said imports with colored linens and exacted the same rate per cent. of duty upon said imports that was by acts of Congress imposed upon colored linens, viz: on imports entered—

1836.			
February 27.	Per South America, amounting to		$111 84
" 16.	" St. Andrew, "		438 96

Of which sums $111 84 was paid on the 27th of February, 1836; $219 96 was paid May 13, 1836, and $219 was paid August 13, 1836, to Samuel Swartwout, collector, as for duties due to the United States; and the said Leggett, Wooster & Frame protested against the exaction of duty on the linens so imported and entered, claiming said imports were by law admissable to entry for consumption free from duty under the acts of 1833.—(4 Statutes at Large, p. 630.)

Your petitioner further shows, that afterwards Leggett, Wooster & Frame became hopelessly bankrupt, and were indebted to one Thomas H. Leggett in a large sum of money, and still are indebted for the same. That said Leggett obtained judgment against said Wooster and said Frame for debts due by said firm, Sylvanus J. Leggett having departed this life. That, in a certain suit entitled, "In chancery, before the vice-chancellor, Thomas H. Leggett *vs.* Ebenezer Wooster and Joseph L. Frame," an assignment was made by Ebenezer Wooster and Joseph L. Frame by order of the vice-chancellor, "of all the propert, money, equitable interests, things in action, and effects of the above named defendants, as surviving partners of themselves and Sylvanus J. Leggett," to your petitioner, Cortlandt Palmer, receiver, under a creditor's bill, for the benefit of Thomas H. Leggett; and the judgment aforesaid is still unsatisfied; and your petitioner still is such receiver.

Your petitioner further shows, that on appplication in behalf of your petitioner, the collector of the customs at New York, under treasury instructions of May 14, 1838, and June 27, 1840, certified to two statements of claims for duties paid by Leggett, Wooster & Frame on their importations of linens aforesaid, viz:

March 2, 1848.	On imports per South America, for	$111 84
Dec. 18, 1847.	On imports per St. Andrew, for	438 96

And soon after the same were certified, the said claims were presented to the Treasury Department for payment by John Ely, attorney for

your petitioner, and were referred to the First Comptroller, McCulloh, for the usual order. Payment being delayed, was also asked for on behalf of your petitioner by Duff Green, esq., and by Charles E. Sherman, esq., and by said Thomas H. Leggett. Afterwards Comptroller Whittlesey, upon a careful examination, reported in favor of the payment of your petitioner's aforesaid claims.

Your petitioner further says, he has reason to believe, and does believe, that it was in consequence of an error made by the officers of the revenue, in exacting the duty by law imposed upon colored linens upon the importations of unbleached linens before mentioned, that the several sums of money above mentioned were exacted; and by reason of a neglect of duty on the part of Comptroller McCulloh, that the claim of your petitioner was not audited and paid; that your petitioner is informed and believes that claims for a return of duties illegally exacted on unbleached linens, such as those here presented, were uniformly refunded by the Treasury Department before and after the claims of your petitioner were presented; that such refunding was, under authority of judicial decisions, acquiesced in by the Treasury Department, and treasury instructions of May 14, 1838, and June 27, 1840, and acts of Congress of 16th October, 1837, (5 Statutes at Large, p. 207,) 3d March, 1839; (5 Statutes at Large, p. 348,) and 8th August, 1846, (9 Statutes at Large, p. 676.)

Your petitioner further shows, that, notwithstanding your petitioner's claims were duly certified to, and duly presented for payment at the Treasury Department, and payment of the same recommended by the First Comptroller, Whittlesey; and as your petitioner verily believes were truly and justly due, and ought to have been refunded, still on or about the 31st day of January, 1850, Secretary Meredith caused your petitioner's claims to be returned to New York to be cancelled, and gave no reason for not paying the same, except "are found to be inadmissible under the laws."

Your petitioner further says, that the before mentioned sums of $111 84, and $438 96 were paid to the collector aforesaid for the use of the treasury of the United States, and the same were by the said collector accounted for, and paid over to the United States.

Wherefore, your petitioner, relying on the justice of his claim and the provision in *the Constitution of the United States*, which provides that private property shall not be taken for public use without just compensation, (1 Stat. at Large, p. 21,) humbly prays this honorable Court to grant such relief by a bill in his favor as may, in the judgment of your honorable Court, be suitable and necessary.

CORTLANDT PALMER,
Receiver.

NEW YORK, *July* 9, 1855.

Statement of duties exacted on unbleached linens imported by Leggett, Wooster & Frame.

Date of entry.	Name of vessel.	Where from.	Description of goods on entry as affirmed to.	Value.	Duty exacted at 24 per ct.
1836. February.	S. America.	Liverpool..	Brown drills	$466	$111 84
February.	St. Andrew.	Liverpool..	Brown linen emb'd. ¾ grey linen drills. ¾ brown linens	1,829	438 96
1855. June.....	Amount of duties exacted.....				550 80
	Add interest to this date, at six per cent., from February 27, 1836, on $111 84, is.....				.....
	May 13, 1836, on 219 96, is.....				.....
	August 13, 1836, on 219 00, is.....				.....
					.....

—— —— *Receiver.*

STATE OF NEW YORK, }
City of New York, } *ss.*

Cortlandt Palmer being sworn, says he has read the foregoing, and the facts stated in the petition are true, to the best of his knowledge and belief.

CORTLANDT PALMER.

Sworn to before me this ninth day of July, 1855.

JOSEPH BRIDGHAM,
United States Commissioner.

CHA. E. SHERMAN,
Attorney.

IN THE UNITED STATES COURT OF CLAIMS.—No. 50.

CORTLANDT PALMER, RECEIVER. CLAIM FOR DUTIES ILLEGALLY EXACTED ON UNBLEACHED LINENS.

Brief of legal points and authorities under Rule 20.

The facts of this case are sufficiently set forth in the petition.

By the tariff act of July 14, 1832, (4 Stat. at Large, 583,) sec. 2, part 21, a duty of 25 per cent. was imposed on manufactures of flax; and by the same section, part 24, a duty of 15 per cent. was imposed upon "bleached and unbleached linens;" and by the tariff act of March 2, 1833, commonly called the compromise act, sec. 4, (4 Stat. at Large, 639,) "bleached and unbleached linens" were exempt from duty.

In behalf of the petitioner it will be contended, on the case shown in the petition and in the depositions, that the collector erred:

In that he exacted a duty of 25 per cent. on certain "brown drills," "brown linens embroidered," "¾ gray linen drills," and "¾ brown linens;" said imports being in fact "unbleached linens," and so known in commerce; and that, under the act of March 2, 1833, above cited, he should have admitted the same to entry exempt from duty. That in like cases, the United States circuit court for the southern district of New York so decided.—(See the cases of John Gihon *vs.* Swartwout; Thompson & Austin *vs.* Swartwout; Wetzlier & Diedricks *vs.* Swartwout. See Hunt's Merchants' Magazine, vol. 2, p.— ; House Doc. 49, 26th Congress, 1st session, p. 7. See letter of the Comptroller, dated August 31, 1844, addressed to George Curtis, esq. See letter of the Comptroller, dated August 31, 1844, addressed to J. P. Van Ness, collector, Senate Doc., p. 74; also, circular of the Comptroller, page 75; and letter of Hon. Levi Woodbury, Secretary of the Treasury, page 75; Senate Doc. 153, 28th Congress, 2d session, page 73.)

2. That the duties now claimed, and amounting to $550 80, were paid under protest, and were by the collector of the customs paid into the treasury of the United States; that under the acts of March 3, 1839, (5 Stat. at Large, 348,) and 8th August, 1846, (9 Stat. at Large, 676,) the duties now claimed ought to have been refunded.

That duty acts are to be construed strictly; and acts for refunding duties are to be construed liberally.—(Whitney *vs.* Emmett, 1 Baldwin, 316.

3. That the money exacted and paid into the treasury, as for duties upon the imports mentioned in the petition, may be recovered before this Court, because the money was obtained without law, and contrary to the acts of 1832 and 1833, before cited.—(See acts of March 3, 1839, and 8th August, 1846, before cited; also, Sumner *vs.* Parish in Dorchester, 4 Pick. 361; Story on Contracts, sections 422, 423, and note under section 677; 2 Greenleaf on Evidence, article 123; United States *vs.* Leyman, 1 Mason, 482, 504; Bank of Commerce *vs.* Union Bank, 3 Comstock, 230; Kinne's Law Compendium, Index, vol. 4, p. 344.)

CHARLES E. SHERMAN,
JOHN ELY,
Counsel for Petitioners.

IN THE COURT OF CLAIMS.

CORTLANDT PALMER, receiver of the assets of EBENEZER WOOSTER and JOSEPH L. FRAME *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

The petitioner alleges that Sylvanus J. Leggett, Ebenezer Wooster, and Joseph L. Frame, formerly partners in business under the firm of Leggett, Wooster & Frame, imported in the months of Janu-

ary and February, A. D. 1836, "from Liverpool into New York, certain unbleached linens, and made due entry of the same for consumption, and entered the same on free entries, and described the same on their entries as 'brown linen drills,' 'brown linen embossed,' 'gray linen drills,' '¾ brown linens,' (words signifying unbleached linens, and also the particular kinds of linens,) and on making entry of the same, one of said firm made oath or affirmation, 'that I have not in the said entry or invoice, concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise.' "

The petitioner further alleges, that "the officers of the customs erroneously classed said imports with colored linens, and exacted the same rate per cent. of duty upon said imports that was by acts of congress imposed upon colored linens, viz: on imports entered—

1836.		
February 27.	Per South America, amounting to.....	$111 84
" 16.	Per St. Andrew "	438 96

of which sums $111 84 was paid on the 27th February, 1836; $219 96 was paid May 12, 1836, and $219 was paid August 13, 1836, to Samuel Swartwout, collector, as for duties due to the United States; and the said Leggett, Wooster & Frame protested against the exaction of duty on linens so imported and entered, claiming said imports were by law admissible to entry for consumption free from duty under the acts of 1833."—(4 Statutes at Large, p. 630.)

These are all the allegations of the petition which we deem it necessary now to notice.

The appraisers, in their reports, stated that the linens were "colored linens," and "colored linen drills;" and the collector exacted duties on them as *colored linens*. The only evidence on file in this case, tending to show that the linens were unbleached, and not colored, is the deposition of Joseph L. Frame, one of the firm of Leggett, Wooster & Frame, who made the importations. The Solicitor has, in writing, waived "objections to Frame's competency," and we have only to consider the weight and effect of his testimony. Opposed to this is the official action of the collector, entered of record, which, to say the least of it, is, we think, entitled to equal weight with the testimony of this witness. How far, in a case like this, parol evidence can be received to contradict the official returns of the collector, we do not deem it necessary now to consider. We are of the opinion that the allegations of the petitioner in this case as regards the character of the linens is not sufficiently sustained, and that the petitioner is therefore not entitled to relief.

35TH CONGRESS, 1st Session. | SENATE. | MIS. DOC. No. 94.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1857.—Referred to the Committee on Claims.
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

J. K. ROGERS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Solicitor's brief.
4. Opinion of the Court.
5. Claimant's second petition, filed by leave of Court.
6. Arguments of claimant and his counsels.
7. Solicitor's brief on second petition.
8. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this second day of February, A. D. 1857.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Honorable Judges of the Court of Claims:

The petition of J. K. Rogers, for himself and in behalf of Cherokees residing in States east of the Mississippi, numbering 2,133 persons, according to the census taken by the Indian department in 1851, respectfully showeth: That your petitioner and said Cherokees, by the treaty of 1835 and supplement thereto, are entitled to their proportionate share *per capita* of $704,947 16 over and above the sum of $914,026 13, found due as per statement of the accounting officers

of the treasury and the settlement made by Congress in 1851, in pursuance of the principles established by the treaty of August, 1846.

This claim is based principally on the 12th and 15th articles of the treaty of 1835, and amounts in the aggregate to $92,625 19. $5,000,000 was given to the Cherokees east for their lands and possessions, and $600,000 was given in lieu of reservations, spoliations, pre-emptions, removal, and all claims against the government of the United States, not otherwise expressly provided for, and any expenditure made out of the $5,000,000, in payment of these items, was a misapplication of the fund, and the United States was bound to make it good. That the fund was applied in part for these purposes, is a fact that cannot be controverted or denied. Removal and spoliations amounted to a much larger sum, whilst reservations, pre-emptions, spoliations, salaries of government agents, and other incidental expenses incurred in the execution of the treaty, were charged to the $5,000,000 fund. In 1838 Congress made a further appropriation of $1,047,067, in full for all objects specified in the third supplemental article of the treaty of 1835 between the United States and the Cherokees; and for the further object of aiding in the subsistence of the Indians for one year after their removal west, *provided* that no part of said money shall be deducted from the $5,000,000 stipulated to be paid to said tribe of Indians by said treaty.

The report of the accounting officers of the treasury, prepared in obedience to a resolution of Congress, shows that removal and subsistence alone amounted to the enormous sum of $2,952,196 26, a sum greater by $1,305,129 26 than the $600,000, and the sum of $1,047,067 appropriated by the act of June 12, 1838. This excess of $1,305,129 26 was paid out of, and deducted from the $5,000,000 fund, in violation of the treaty of 1835 and proviso of said act. In consequence of these, and other extravagant and improper expenditures taken from the $5,000,000, it was found that the balance left for *per capita* distribution was scarcely worth demanding. These facts were brought to the notice of Congress in 1842, and the Senate and House of Representatives passed resolutions clothing their respective committees on Indian affairs with power to send for persons and papers. The Senate committee did not act, inasmuch as it was thought the investigation belonged more appropriately to the House. The House committee commenced the investigation, and Mr. Harris, of Virginia, made a report in part in 1842. At the following session it was again resumed, and Mr. Cooper, of Pennsylvania, chairman, reported the facts obtained by the investigation to the House, (House doc. No. —.)

No further action was taken by Congress on the subject until after the negotiation of the treaty of 1846. One of the principal objects of this treaty was to settle the difficulties which had for a considerable time existed between the different portions of the people, constituting and recognized as the Cherokee nation of Indians, and also to settle certain claims that existed on the part of the Cherokee nation, and portions of the Cherokee people, against the United States. The Ross, or national party, claiming all moneys due the Cherokees, and subject to the *per capita* division under the treaty of 1835, and the

treaty party claiming indemnity for losses incurred in consequence of the treaty of 1835, while the old settlers claimed indemnity from the United States for permitting them to be robbed of their country, and despoiled of their government by the Cherokees emigrating under the treaty of 1835. To settle these difficulties and claims, and provide compensation to the old settlers for the undivided interest which the United States regarded them as owing in the country east of the Mississippi, under the equitable operation of the treaty of 1828, was the object of the treaty of 1846.

Articles 3 and 9 of said treaty establishes the basis of settlement with the Cherokee emigration under the treaty of 1835. Article 4 specifies the mode and manner of settlement with the old settler Cherokees. The duty of stating the accounts according to the principles of the treaty of 1846, was committed by joint resolution of Congress of the 7th of August, 1848, to the Second Auditor and Second Comptroller of the Treasury. The result of their labors is presented in their report of December 3, 1849; and on the 8th of August, 1850, Mr. Sebastian, from the Committee on Indian Affairs, made a report to the Senate, adopting in part the report of said accounting officers. They make a balance due the Cherokee nation

of.....	$627,683 95
To this the committee, acting as umpire, added for incidental expenses connected with the removal.....	96,999 42
For subsistence unpaid, or rather overcharged.....	189,422 76
Making in the aggregate the sum of.....	914,026 13

due the eastern Cherokees, according to the principles of the treaty of 1846.

The committee, after deducting all proper charges from the $5,600,000, according to the basis of the 4th article of the treaty of 1846, leave a balance of $1,571,346 55, and allowed a sum equal to one-third of this balance to the old settlers for their interest in the Cherokee country east, being $523,782 18; making a difference of $657,320 40 in favor of the Cherokees under the treaty of 1835, over and above the $914,026 13 declared to be due them under the treaty of 1846. To this balance of $1,571,346 55 must be added $22,212 76, the amount charged by Senate committee for expenses of Cherokee committee, which was improperly deducted from the $5,000,000 fund, it not being one of the items specified in the 15th article of the treaty of 1835, and also $25,414 09, an amount greater than the $600,000 provided for removal and spoilations in the third supplemental article and improperly deducted; which sums being added to the $657,320 40, would make $704,647 16 due the Cherokees under the treaty of 1835; of which the Cherokees residing in States east would be entitled to their proportionate share; the Cherokees west being concluded by the treaty of 1846. Divide this sum equally between 16,231, this being the number of Cherokees both east and west by the census of 1851, under which the $914,026 13 was paid *per capita*, and it would give each person $43 43 per head. The old settler Cherokees were not included in this census, neither did they participate in the division. The Cherokees emigrating under the treaty of 1835 have no fur

claim to *per capita*, being concluded by the treaty of 1846, and the final settlement of February 27, 1851; and the number of Cherokees east, by the census aforesaid, who are entitled to *per capita*, being 2,133 at the rate of $43 43 per head, would give them in the aggregate, as their proportionate share of this amount still due, the sum of $92,625 19, on which they claim interest at the rate of 5 per cent. per annum from the 12th day of June, 1838, until paid. The report of the committee was concurred in by the Senate, and Congress made an appropriation to carry it into effect.

This claim, as stated, is based principally on the 12th and 15th articles of the treaty of 1835 and supplement thereto, and any improper deductions made from the $5,000,000, under the operations of the treaty of 1846 was not only a violation of the treaty of 1835, but was also an infringement of the rights of said Cherokees existing under it, as re-guaranteed by the 10th article of the treaty of 1846, which does not in any manner take away or abridge any rights or claims which the Cherokees (then) residing in States east of the Mississippi river had, or may have, under the treaty of 1835, and supplementary thereto. This is a clear affirmation of all their rights and claims under the treaty of 1835–'36, by the treaty of 1846, and your petitioners are therefore, under a strict construction of the treaty of 1835, entitled to a much larger sum than that now claimed; but they have thought it best under the circumstances to ask only for their proportionate share of the balance found due by the committee and Congress under the treaty of 1835–'36, after deducting all proper charges from the $5,600,000 over and above the $914,026 13 found due under the treaty of 1846, with an addition of the two items as already stated.

Your petitioner, at the 2d session of the 32d Congress, memorialized Congress in behalf of this claim, which was presented in the House of Representatives and referred to the Committee on Indian Affairs. Mr. Caldwell, of North Carolina, prepared a report in favor of principal and interest, which was unanimously adopted by the committee, but the committee not being called for reports during that session, it was not submitted to the House.

At the 1st session of the 33d Congress this memorial was again presented in the House of Representatives, and again referred to the Committee on Indian Affairs, and on the 20th of March, 1854, Mr. Grow, from that committee, made a report in favor of the principal, with interest from December 14, 1852, to time of payment. He also offered an amendment directing its payment to the general Indian appropriation bill, which passed the Committee of the Whole by a considerable majority, but was lost in the House.

This memorial was afterwards presented in the Senate, and referred to the Committee on Indian Affairs, by whom the report of Mr. Grow was adopted; and Mr. Sebastin afforded a similar amendment to that of Mr. Grow to the general Indian appropriation bill, which was passed unanimously by the Senate. The bill was then returned with this amendment, and the House refused to concur. The Senate insisted on their amendment and asked for a committee of conference, where it was finally lost.

It is proper here to state, that on the 5th of June, 1854, Mr. Houston, chairman of the Committee of Ways and Means, addressed a letter to the Secretary of the Interior, asking his opinion as to the merits of the claim. The letter was referred to the Commissioner of Indian Affairs for a report, and on the 20th of the same month the Secretary transmitted the report of the Commissioner, in which he declined to express an opinion, inasmuch as it might be considered discourteous to the Senate and the Indian committee of the House, who had already passed judgment on the claim.

At the 2d session of the same Congress a supplemental memorial was presented in the House and referred. The Committee on Indian Affairs, under a joint rule, resumed the consideration of the claim as unfinished business, when the report of Mr. Grow was again adopted, and he instructed to present it to the House, a copy of which is herewith submitted. The memorials referred to are hereunto annexed, and prayed to be made part of this petition.

J. K. ROGERS,
In behalf of himself and the Cherokees in States east.

COUNTY OF WASHINGTON, }
District of Columbia, } *ss.*

On this seventeenth day of July, eighteen hundred and fifty-five, personally appeared before me, one of the justices of the peace in and for the county aforesaid, the above named Johnson K. Rogers, one of the claimants, and made oath upon the Holy Evangely of Almighty God that the facts as stated in the above petition are true, to the best of his knowledge and belief.

J. D. CLARK, *J. P.*

Brief of authorities and arguments relied on to sustain the claim of J. K. Rogers and 2,133 *Cherokees, referred to in petition, &c.*

ARTICLES OF TREATY OF 1835.

ARTICLE 1 gives $5,000,000 for the lands and possessions of the Cherokee nation east of the Mississippi, and again submits to the Senate the question of an allowance for spoliations.—(Stat. at Large, vol. 7, p. 475.)

ART. 12. "Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita*, as soon as an appropriation is made for this treaty."—(Same vol., p. 483.)

ART. 15. "It is expressly understood and agreed between the parties to this treaty, that after deducting the amount which shall be actually expended for the payment for improvements, ferries, *claims*

for spoliations, removal, subsistence, and debts, and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer classes of Cherokees, and the several sums to be invested for the general national funds, provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east, according to the census just completed."—(Same vol., p. 485.)

The above are the two articles, as stated in the petition, on which the claim is principally based, and I have italicised the words claims for spoliations, and removal, as marks to indicate that any expenditure made for these purposes out of the $5,000,000 was without authority of law, and an abridgment of the rights and claims of the Cherokees residing in States east of the Mississippi under the treaty; in proof of which I quote 2d and 3d articles of the supplement:

ART. 2. "Whereas the Cherokee people have supposed that the sum of $5,000,000, fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river, was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above mentioned sum of $5,000,000 should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ART 3. It is therefore agreed that the sum of $600,000 shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the government of the United States, not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of $300,000 for spoliations described in the first article of the above mentioned treaty. This sum of $600,000 shall be applied and distributed agreeably to the provisions of said treaty, and any surplus which may remain after removal and payment of the claims so ascertained, shall be turned over and belong to the education fund."—(Stat. at Large, vol. 7, p. 488–9.)

The supplement is part and parcel of the treaty, and, although removal and spoliations are enumerated among the items that were to be deducted by the 15th article from the $5,000,000, yet it is clear they were abrogated by the 2d and 3d articles of the supplement, and constituted a charge against the United States and not the Cherokees; whilst it is equally clear that reservations, pre-emptions, and expenses of Cherokee committee, not enumerated in said article, constituted no charge against said fund. With regard to the one year's subsistence, it is doubtful, from the phraseology of the 8th and 15th articles, whether this expenditure was to be borne by the United States or deducted from the $5,000,000.—(See article 8, same vol., p. 482.)

It would seem, however, that removal and subsistence were placed

on the same footing, and the United States agree and stipulate to perform the duty—whether in the capacity of agent of the Cherokee nation or as guardian of their funds, does not appear, neither is it material to the point. The question at issue is, who was to foot the bill? If the Cherokees, no more than $33 33 a head for subsistence could be deducted from their fund; if the United States, she was her own agent, and the Cherokees had no authority to question her right to pay more. As to the exp nse of removal, that question was settled, and but for subsistence not being stricken out of the 15th article by the 3d supplement, there could be no doubt that it constituted a charge against the United States. Indeed, the question was of such doubtful import, that the House of Representatives adopted a resolution inquiring of the Secretary of War how much would be required, and on the 25th of May, 1838, Mr. Poinsett replies to this resolution by letter, in which he submitted to the House estimates; consequently, Congress made an appropriation for subsistence and all other objects specified in the 3d supplement, in the following language:

"That the sum of $1,047,067 be appropriated, out of any money in the treasury not otherwise appropriated, in full for all objects specified in the 3d article of the treaty of 1835 between the United States and the Cherokees; and for the further object of aiding in the subsistence of the Indians for one year after their removal west: *Provided*, That no part of the said sum of money shall be deducted from the $5,000,000 stipulated to be paid to said tribe of Indians by said treaty."—(Statutes at Large, vol. 5, p. 242.)

The causes which led to the passage of the above act are fully set forth in the report of the Senate Committee on Indian Affairs of August 8, 1850. Speaking of the objects of the act, the committee say: "Here was a clear legislative affirmation of the terms offered by the Indians and acceded to by the Secretary of War. It was a new contract with the Ross party, outside of the treaty, or rather a new consideration offered to abide by its terms. The Secretary of War agrees to consider the expenses of removal and *subsistence* as *intended* by the treaty of 1835 to be borne by the United States, and Congress affirm his act by providing that no part of the $1,047,067 should be taken from the treaty fund. It was made auxiliary to the $600,000 provided for in the third supplemental article—a fund provided for removal and other expenditures independent of the treaty, and in full for all these objects."—(Grow's report, pages 7, 8, 9 and 10.)

Admitting that subsistence was intended to be borne by the Cherokees, and estimating the whole number at 18,335, the precise number according to the census taken by the United States in 1835, and allowing the amount stipulated to be paid by the 8th article, namely, $33 33 a head, it would not only amount to $611,105 55, which sum was deducted by the committee from the $5,600,000, in their settlement with the "old settlers" in 1850, (pages 5 and 6 of Grow's report,) and the Cherokees in States east have made no claim to any part of it in their petition. Without, therefore, taking subsistence into account, and considering it as a charge on the $5,000,000 fund, it would then leave an expenditure, according to the report of the Sec Comptroller and Second Auditor, for spoliations and removal al

$2,952,196 26. The amount provided by the United States applicable to the liquidation and payment of this expenditure was $600,000, named in the 3d supplement, and $1,047,067 appropriated by the act of June 12, 1838, making in the aggregate $1,647,067, which, being deducted from $2,952,196 26, leaves a balance expended and unprovided for by any appropriation of $1,305,129 26, but which was liquidated and paid by the United States as trustee out of the $5,000,000 fund, in violation of the proviso of the act of 1838 and 2d and 3d articles of the supplemental treaty of 1836. Credit, therefore, this balance with $611,105 55 for one year's subsistence, and it would leave a remainder of $694,024 71. To this add the expense of Cherokee committee named in the 12th article of the treaty of 1835, and sum over-charged for spoliations, and it would leave a balance considerably larger than that claimed in the petition. Take either this statement or the one made by the Committee on Indian Affairs of the Senate, and there is no escape from the conclusion that there is a larger balance yet due the Cherokees residing in States east under the treaty of 1835–'36.

It is now necessary to examine the treaty of 1846, with a view of ascertaining how far those rights and claims were abridged by and under its provisions.

ART. 10. "It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river had, or may have under the treaty of 1835 and the supplement thereto."—(Statutes at Large, vol. 9, p. 875.)

Could language be more explicit? The article speaks for itself, and comment would only serve to mistify and complicate its meaning.

ART. 4, same vol., page 872–'3, establishes the mode and manner of settlement with the "old settlers" or "western Cherokees;" and article 12, same vol., p. 876, at the instance of the delegation of the "old settlers," proposes "that the question shall be submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliations, under the treaty of 1835, is *properly* and *legally* chargeable to the $5,000,000 fund."

The amount found due the "old settlers" by Congress is minutely and specifically stated in Senator Sebastian's report.—(Grow's report, pages 5 and 6.) My views on the subject are expressed at length in supplemental memorial, pages 3 and 4, under head of article 4, treaty of 1846.

The mode and manner of settlement with the Cherokees emigrating under the treaty of 1835, is specified in the following articles of the treaty of 1846.

Article 3 provides that certain claims therein enumerated and paid out of the $5,000,000 fund, shall be reimbursed by the United States. —(Statutes at Large, vol. 9, p. 872.)

Article 9 provides that "a fair and just settlement of all moneys due the Cherokees, and subject to *per capita* division under the treaty of 1835, which said settlement shall exhibit all money properly expended

under said treaty," (as altered and amended by this article,) in the following words: "The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over *per capita*, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and supplement of 1836, being all those Cherokees residing east at the date of said treaty and supplement thereto."—(Same vol., p. 875.)

The alterations and amendments made in the treaty of 1835–'36 by this article, as above indicated, consists in this: The gross sum of $5,600,000 provided by the treaty of 1835–'36 is changed and enlarged by the ninth article of the treaty of 1846 to $6,647,067, and removal, spoliations, subsistence, and other improper expenditures in unlimited amounts are to be deducted therefrom; whereas, by the treaty of 1835 and supplement of 1836, removal and spoliations were not deductable from the $5,000,000 fund, and subsistence, if deductable at all, to a limited extent only.—(See Sebastian's report, pages 5 and 6 of Grow's report, and also report of Second Comptroller and Second Auditor, pages 11 and 12, Grow's report.)

In my memorial to Congress of January 12, 1853, pages 2, 3, 4, and 5, I have endeavored to show how and in what particulars the treaty of 1835 and supplement of 1836 was altered and amended by the treaty of 1846, also supplemental memorial, pages 5, 6, 7, and 8.

I omitted to state one fact in my petition which I now take the liberty of doing here; it is this: During the term of the 2d session of the 33d Congress, whilst my claim was before the Committee on Indian Affairs, and not in the possession of the House, the chairman of the Committee of Ways and Means thought proper to ask the Commissioner of Indian Affairs (whether verbally or in writing does not appear) for his opinion as to its merits. As to the action of Congress on this claim, I refer to the Journals of the Senate and House, pages —.

On the 11th of January, 1855, the Commissioner says: I have examined, in compliance with your request, the claim of "J. K. Rogers, for himself and the Cherokees in States east of the Mississippi river," for additional *per capita* claimed to be due them by express provisions of the treaty of 1835–'36 and 1846. "My opinion is that there is no good foundation for the claim, if the treaty of 1846 with the Cherokees, and the appropriation made by Congress, approved 27th February, 1851, are to be regarded as an exposition of the intention of the parties in interest."

This is a singular mode of expressing an opinion; in other words, it is what is generally termed "begging the question," and but for the word "*if*," one would be at a loss to comprehend its meaning and intention. What is it? Why, says the Commissioner, if the treaty of 1846 and the act of 1851 "are to be regarded as an exposition of the intentions of the parties in interest, there is no good foundation for the claim." And *visa versa:* "If" the treaty and act of Congress were not "regarded as an exposition of the intentions of the parties in interest," would it not be a concession that there was a good foundation for the claim? Such would be the only reasonable inference to be derived from this official rule of logic. In construing this

much, if not everything, depends on the use made of the word "if." "If" it is admitted that the premises assumed by the Commissioner is correct, it necessarily follows his conclusions are equally so. I am not prepared to make such concessions or admissions. No statement made in the memorials of the parties warrants such construction. On the contrary, they state that the claim is "due to them by express provisions of the treaties of 1835–'36 and 1846," and the Commissioner so states the case, but failed to give the quotation marks; and then goes on to give his opinion with his if's, as though "the parties in interest" had admitted that the treaty of 1846 and act of 1851 was "an exposition of their intention." What right or authority had he to draw such inferences? Certainly not from the memorials, either of the treaties, or act of 1851. Again, he says in the next paragraph:

"This claim is predicated on the mode of settlement indicated by the Second Comptroller and Second Auditor, under the joint resolution of the Senate and House of Representatives of the United States of the 7th August, 1848, and a report of the Committee on Indian Affairs of the Senate of the United States of August 8, 1850."

This is not the fact; the claim is not now nor never was predicated on either of the reports indicated by the Commissioner. It was, and now is, predicated on the 12th and 15th articles of the treaty of 1835 and 2d and 3d articles of the supplement and guarantee of the 10th article of the treaty of 1846; and the reports of the accounting officers of the treasury and Committee on Indian Affairs of the Senate were referred to and quoted in the memorials as evidence to prove that the Cherokees in States east were entitled to a larger sum than that found due by the settlement of 1851, under the 9th article of the treaty of 1846; and I confess I have not as yet seen anything in the opinion of the Commissioner to prove the contrary. I shall only notice one or two other positions assumed in the opinion. At page 2, paragraphs 2 and 3:

"The memorialists contend that the 9th article of the treaty of 1846, providing for a just settlement of all moneys due the Cherokees, and subject to the *per capita* division under the treaty of 1835–'36, does not apply to them, on the ground that that article refers to the Cherokee people west only."

The memorialists contend for no such thing. What they have and do contend for is this: That said 9th article *changed* and *altered* very *materially* the 15th article of the treaty of 1835 and supplement thereto, and that a much smaller amount was found due under it than that which was properly and legitimately due under the articles of the treaty of 1835–'36. They also contended, on a former occasion, for their proportionate share *per capita* of the amount that was found due by the settlement of 1851, according to the principles of said 9th article, and what is more, they got it, through the *proviso* of the act of 1851, and the interposition of the *opinion* of the Attorney General of the United States, which forever put to rest the question so "*seriously mooted*" at the time by the Indian Office and Ross delegation, and referred to in paragraph 4, page 2, of the Commissioner's opinion. Of this fact no one is or should be better acquainted than the Commissioner of Indian Affairs, and yet, in the 3d paragraph, it would

seem that he "cannot comprehend the propriety of the objection, when it appears that the Cherokees, so called, residing in States east of the Mississippi received their *per capita* distribution arising under the treaty of 1846, and the conditions imposed by the act of appropriation approved 27th February, 1851, as in full of all claims under the treaty of 1835–'36, and the supplemental treaty of 1846, without protesting at the time of the receipt of the money that it was not in full, as indicated in the receipt."

Did not the Commissioner know at *the* writing of his opinion, and *now*, that the treaty of 1846 was made exclusively with the different factions of the Cherokee nation west, and that it never had any binding force or controlling power over the Cherokees (then) residing in States east, who were not parties to it? They were not constituents of the treaty-making power of the Cherokee nation, and required no new treaty. Their rights and claims were already secure under the treaty of 1835–'36, and they only *insisted* that they should not be *curtailed* or *disturbed* by the treaty of 1846, hence the insertion of the 10th article of that treaty.

The Commissioner places great stress and importance on the act of 1851, and "receipts executed by the Cherokee Indians resident in States east of the Mississippi." What is the act of 1851, and what are its requirements? I quote it:

"For payment to the Cherokee nation the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum, from the 12th day of June, 1838, until paid, shall be paid to them out of any money in the treasury not otherwise appropriated, but no interest shall be paid after the first of April, 1851, if any portion of the money is then left undrawn by the said Cherokees: *Provided, however*, That the sum now appropriated shall be in full satisfaction and final settlement of all claims and demands whatever of the Cherokee nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: *And provided, further*, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of 6th August, 1846."—(Statutes at Large, vol. 9, pp. 572–'3.)

It must, therefore, be perceived that the requirements of the act are simply these: 1st. The money shall be paid to the Cherokee nation. 2d. The Cherokee nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except, &c. If the act had stopped here, then a receipt in full from the *Cherokee nation* for any further demands against the United States might have been successfully urged by the Commissioner against said nation; but

the proviso to the act was not only fatal to the Cherokee nation receiving and receipting for the money, but is equally so to the receipts of the Cherokees residing in States east, produced by the Commissioner against any further demands they may have against the United States.

Before the act was consummated in Congress it was discovered that the money proposed to be appropriated by it, by express terms of the treaties of 1835–'36 and of 1846, did not belong to the Cherokee nation, and the act without the proviso would be a violation of said treaties. In consequence of this "the Cherokee Indians resident in States east of the Mississippi" did not hesitate to give their "receipts in full of" their "proportionate shares of the money appropriated for the benefit of the Cherokees by the acts of Congress of 1850 and 1851," knowing, as they did at the signing of the receipts, the effect of the proviso. The rule of construction is, "where the proviso of a statute is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers."—(Opinions of Attorneys General, vol. 5, pp. 330, 331; also, same vol., p. 383.) The act of 1850, referred to in the opinion of the Commissioner, makes an appropriation for the exclusive benefit of the "old settlers," and I cannot see the propriety of its induction in connexion with the receipts of Cherokees in States east.

With regard to the objections urged against the claim in the House of Representatives, they will be found with the answers and authorities referred to, and quoted in supplemental memorial, pages 1, 2, and 3.

After all, it seems to me the whole question of the right of Cherokees residing in States east to additional *per capita* resolves itself into this: 1. Were "all extravagant and improper expenditures" excluded by the Senate in their settlement with the "old settler" Cherokees in 1850, and were all the "investments and expenditures chargeable upon the $5,600,000, and particularly enumerated in the fifteenth article of the treaty of 1835, "properly" and "legally" deducted from said aggregate sum, by which it was ascertained that $1,571,346 55 would be "left for *per capita* distribution among the Cherokees emigrating under the treaty of 1835," or rather the Cherokees included in the census of 1835? And 2. Did the fourth article of the treaty of 1846 require the United States to do more, or less, for the "old settler Cherokees" in making said charges to, and deductions from the $5,600,000, than was absolutely required to be done for the eastern Cherokees by the fifteenth article of the treaty of 1835–'36, with the two exceptions stated elsewhere? If yea, then the question is settled by the tenth article of the treaty of 1846—the settlement of 1851, made in pursuance of the ninth article of said treaty, to the contrary notwithstanding.

One other question remains to be considered, and that is the question of interest.

The Committee on Indian Affairs of the House of Representatives reported in favor of interest from December 14, 1852, to time of payment, upon the supposition, as I was informed, that the claimants had not asked for the principal previous to that date.—(Grow's report,

page 2.) This was an error. If the mere asking for the principal was all that was requisite to confer a right to interest, it will be found that a demand was made for the principal at a much earlier period. As long ago as July or August, 1838, the Cherokee committee protested against the Scott and Ross contract for the removal of the Cherokees on several grounds; one of which was that it would diminish the *per capita* then more than due to all the Cherokees included in the census of 1835. Other applications were made at various times.—(Harris' report, House Doc. No. 1098, vol. 5; also Cooper's report, 27th Congress, 3d session, House Doc. No. 288.)

The claimants, however, base their right to interest on what they conceive to be higher and better ground, viz., the twelfth article of the treaty of 1835. Speaking of the binding obligations of treaties, the Committee on Indian Affairs of the Senate say: "It has been the uniform practice of this government to pay and demand interest in all transactions with foreign governments, which the Indian tribes have always been said to be, both by the Supreme Court and all other branches of our government, in all matters of treaty or contract."—(Grow's report, page 10, paragraph 2.) "In the case of Wocester *vs.* the State of Georgia," the Supreme Court says: "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applicable to all in the same sense."

I have said all that I have to say on the subject of interest in supplemental memorial, pages 8 and 9.

J. K. ROGERS.

WASHINGTON, *July* 30, 1855.

IN THE COURT OF CLAIMS.—No. 133.

ON THE PETITION OF J. K. ROGERS AND OTHER CHEROKEES.

Brief of the United States Solicitor.

This is a claim for $92,625 19, with interest at five per cent. from the 12th June, 1838, till paid, making now upwards of $170,000.

By the first article of the treaty of 1835 with the Cherokees, it was agreed by the United States to pay them $5,000,000 for their lands, &c.

The 12th article recognized the Cherokees who did not remove west with the nation, but became citizens of the eastern States, as entitled to their due portion of all the benefits of the treaty; and, among other things, to participate in the per capita distribution contemplated by the 15th article.

The removal effected by the treaties of 1835 and 1836, and the act of June 12, 1838, led to difficulties between the new emigrants and that portion of the Cherokee nation which had been settled in the west prior to 1835. These difficulties, with disputes between the government and the Cherokees as to what was chargeable to the five millions

fund and what should be paid by the United States, led to the treaty of 1846, in which provision is made for quieting all disputes among themselves and with the government. In pursuance of these provisions, an account was taken by the Auditor and Comptroller, which was adopted, with some modifications, and appropriations were made to carry it into effect, the last of which is in these words:

"In payment to the Cherokee nation, the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum from 12th June, 1838, until paid, shall be paid to them out of any money in the treasury not otherwise appropriated; but no interest shall be paid after the 1st April, 1851, if any portion of the money is then left undrawn by the said Cherokees: *Provided, however*, That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee nation shall, on payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee nation; and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees; *And provided, further*, That the said money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of 6th August, 1846."

See act of 27th February, 1851.

These claimants received their due proportion of this appropriation, and executed a receipt in full, according to the requirements of the act.

But it is argued by the petitioners, that they are not estopped from going behind this settlement to dispute the basis on which it was made: 1. Because, by the 10th article of the treaty of 1846, "it is expressly agreed, that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees, now residing in States east of the Mississippi river, had or may have under the treaty of 1835 and the supplement thereto." 2. Because the act in question only provides for receipts of this character by the Cherokee nation, and does not require them from the individuals who have become citizens of the States. 3. That the proviso is repugnant to the purview of the statute, &c. (See pp. 8, 9 of the petitioner's brief.)

1. Has the treaty of 1846 "taken away or abridged any right" which the Cherokees, citizens of States, had under the treaty of 1835 and the supplement thereto. It is contended that the balance ascertained by the accounting officers, under the resolution of 7th August, 1848, was a balance ascertained professedly "in accordance with the principles of the treaty of 1846, and not in accordance with the treaty of 1835–'36;" that the principles thus adopted in the settlement did operate to take away and abridge the rights in question. The first modification of the treaty of 1835–'36, effected by that of 1846, cited in support of this allegation, is, that whereas by the said treaty of 1835–'36,

the aggregate sum from which deductions were to be made, according to the 15th article of said treaty, was the sum of five millions six hundred thousand dollars; by the treaty of 1846, the aggregate sum from which the deductions specified in the 9th article were made, was $6,647,067. The aggregate sum being greater by the last than by the first treaty, would authorize the contrary inference from that drawn by the claimants.

The second allegation is, that the deductions from the aggregate sum authorized by the treaty of 1846 were greater than those authorized by the treaty of 1835; and it is said that the treaty of 1846 admits of deductions from said aggregate sum for spoilations and subsistence, in unlimited sums, and removal may be charged variously, at the rate of $20, $30, $40, $65, $95, and $103 25 per head; whereas by the treaty of 1835–'36, "removal, and one year's subsistence after removal, is limited at $53 33 per head."—(See 8th article, treaty 1835–'36.) "So is the sum limited out of which spoilations are to be paid." This is claimed to result from the 3d supplemental article.

These allegations would involve the necessity of comparing the language of the treaties, did not the petitioner admit on the same page in which he makes them, (see page 5 of his argument 12th January, 1853,) that, "*on turning to the fifteenth article, we find removal, subsistence, and claims for spoliations embraced in the enumerated items to be deducted from the five millions;*" and though he insists that the third article of the supplement so modifies the fifteenth, that neither removal or spoliation can be legitimately charged to the five millions fund, it is perfectly plain, on reference to said supplemental article, that it merely created an addition to the fund without in the least affecting the enumeration of the fifteenth article.

It will be found that, so far from its being true that the treaty of 1846 took away or abridged any right under the treaty of 1835, it greatly enlarged and extended these rights.

By reference to the third article of the treaty of 1846, it will be perceived that the United States abandons many charges which the accounting officers had supposed legitimately chargeable against the fund. Mr. Sebastian's report, confirmed by the Senate, abandons another large sum which he admits was clearly chargeable to that fund under the treaty; and hence, when the settlement is spoken of as being made in pursuance of the principles of the treaty of 1846, it is meant only that the concessions made in the treaty of 1846 are carried out in the settlement.

On first taking up this case for investigation I was much confused by the mingling of discussions in respect to the basis of settlement with the "old settlers," with that adopted for the eastern Cherokees. The same thing, I am satisfied, has happened to those who investigated the subject as members of the committees of the House and Senate. But, in point of fact, the basis on which the settlement was made with the old settlers, established by the fourth article of the treaty of 1846, has no connexion with, and affords no light whatever upon the present claim. The considerations upon which the old settlers were allowed the half million voted to them in 1850 are set forth in Mr. Sebastian's report of that year. The amount was arrived at by a process indicated in the fourth article of the treaty of 1846

The settlement with the eastern Cherokees was arrived at by another process—that stated in articles three and nine of said treaty. Great concessions were made in these last articles to the eastern Cherokees, and greater still in the other article to the old settlers. The petitioners seem to think that they have the right to claim according to rule which concedes the most, although no part of the reasons which induced the United States to make the additional concessions to the old settlers is applicable to the petitioners. It is on the basis of the settlement with the old settlers that the committee of the House reported favorably on this claim. The action of the Senate (see Cong. Globe, vol. 28, part 2, p. 1285) proceeded on a ground that is not pretended in this petition, but is expressly contradicted. It is, that Cherokees east did not get their part of the appropriation of 1851, but that the sum here claimed *was paid by mistake to the western Cherokees!* whereas these claimants admit distinctly that they received their full proportion of the $914,026 13, but wish to be heard now to say that they were entitled to more.

I subjoin the accounts rendered by the accounting officers on the two different bases above referred to, to be found at pages 6 and 11 of Grow's report.

1*st*. *The account with the old settlers is as follows:*

This fund, provided by the treaty of 1835, consisted of			$5,600,000 00
From which are to be deducted, under the treaty of 1846, (fourth article,) the sums chargeable under the fifteenth article of the treaty of 1835, which, according to the report of the accounting officers, will stand thus:			
For improvements		$1,540,572 27	
For ferries		159,572 12	
For spoliations		264,894 09	
For removal and subsistence of 18,026 Indians, at $53 33⅓ per head		961,386 66	
Debts and claims upon the Cherokee nation, viz:			
National debts (10th art.)	$18,062 06		
Claims of United States citizens (10th article)	61,073 49		
Cherokee committee (12th article)	22,212 76		
		101,348 31	
Amount allowed United States for additional quantity of land ceded		500,000 00	
Amount invested as general fund of the nation		500,880 00	
Making in the aggregate the sum of			4,028,653 45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum contemplated by the fourth article of the treaty of 1846, of			1,571,346 55

Of which amount one-third is to be allowed to the western Cherokees for their interest in the Cherokee country east, being the sum of $523,782 18.

2d. The account with the Cherokees east is thus stated:

There has been paid—	
For improvements, the sum of	$1,540,572 27
For ferries, the sum of	159,572 12
For spoliations, the sum of	264,894 09
For removal and subsistence, and commutation therefor, including $2,765 84 expended for goods for the poorer classes of Cherokees, as mentioned in the 15th article of the treaty of 1835–'36; and including, also, necessary incidental expenses of enrolling agents, conductors, commissaries, medical attendance, supplies, &c., the sum of	2,952,196 26
For debts and claims upon the Cherokee nation, the sum of	101,348 31
For the additional quantity of land ceded to said nation, the sum of	500,000 00
For amount invested as the general fund of the nation, the sum of	500,880 00
The "aggregate of which general sums" is	6,019,463 05
And which, being deducted from the sum of	6,647,067 00
Agreeably to the directions of the ninth article of the treaty of 1846, leaves a balance of	627,603 95
due to the Cherokee nation.	

The item which causes the balance for distribution in the last account to fall below the balance in the first, is that for removal and subsistence. This item in the last account, as stated on the face of the account, except the sum of $96,999 42, which was stricken out by the Senate, is in accordance with the treaty of 1835, under which these petitioners claim. The corresponding item in the first account was made up in accordance with the express stipulation with the old settlers, in the 4th article of the treaty of 1846, and upon considerations in which these claimants had no part whatever.

2. By reference to vol. 24, p. 2152, vol. 22, p. 1334, of Congressional Globe, the court will perceive that the whole Senate, including Mr. Sebastian, who has been throughout the ardent friend of the Indians, concurred in saying that the treaty of 1846, and the appropriation under it, were to be a *finality* in settling with the Cherokees. Some of the senators thought there ought to be further or additional allowances, but all concurred that this was to be the last; and it will be perceived by the debate in 1852, that even the vote of a few thousand dollars to supply the per capita to those Indians who had failed to be present to receive their portion of the appropriation of 1851 was denied, because there had been a final adjustment of this matter, and

the Senate would not agree to re-open it, even for so small a sum and upon such grounds. Indeed, the whole proceedings show that it was the settled purpose of the Senate to close the business then and forever, and the only question was, how and by what language it should be done; and it was suggested by a member of the Committee on Indian Affairs, that the best mode to effect it was to say, in the appropriation, that it was in full and final, not with respect to the Cherokee nation as a nation, but with respect to the Cherokee nation as individuals, for it was with respect to individuals only they were legislating. The same is true of the action of the House, (see vol. 23, p. 603, Congressional Globe.) The ground taken in the brief that the receipt provided for by the law was from the nation as a corporate body, and therefore such a receipt from individuals was not required, overlooks not only the obvious sense in which the words "Cherokee nation" are used in the act, but the whole intent of the act.

It is perfectly obvious that the words *Cherokee nation* in this appropriation are used as synonymous with *all the Cherokees.*

3. As respects the third proposition, that the last proviso was repugnant to the purview, and so must stand, I do not see how that aids the argument for the petitioners. That proviso has the precise effect on the construction of the act which I contend for above, and puts it beyond doubt, that in speaking of the Cherokee nation, all the individuals of the nation, and not the nation in its corporate capacity was meant. It will be seen by the debates, that it was intended that the money should be paid to the individuals; and it was not to leave any doubt about construction to the department that this proviso was appended. This was morever required, as a compliance with both the treaties, which stipulated that, after certain payments out of the five millions fund, the balance was to be distributed per capita by the government of the United States. The government, after a great expense and delay, finally adjusted the account, added interest on all the arrearages, and made the distribution, and took a receipt from these claimants, expressing that it was in full. Everything, almost, that was claimed by the intelligent and active agents who represented the Indians was allowed; and many of the senators, among others Mr. Hunter, the Chairman of the Senate's Committee on Finance, expressly saying that much was allowed to which they had no title, but, as it was to be a final settlement, he would withdraw all opposition, and let the appropriation pass. Under such circumstances, and especially in view of the complicated nature of the business, it was right that the government should demand a receipt in full, and have an express recognition that this was to be a final adjustment when the money was paid. Having given this, the petitioners ought not to be heard.

I refer the Court, for an able exposition on this subject, and an unanswerable argument against the claim, to the speech of Mr. Houston, of Alabama, delivered in the House of Representatives on the 24th March, 1854, reported in part 1st of 28th volume Congressional Globe, page 738.

M. BLAIR.

OPINION OF JUDGE SCARBURGH.

J. K. ROGERS *vs.* THE UNITED STATES.

The following opinion (in the case of J. K. Rogers *vs.* The United States) was delivered by Judge Scarburgh on November 29, 1855:

The petitioner belongs to the class of Cherokees contemplated in the twelfth article of the treaty of 1835–'36. That article is as follows: "Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita*, as soon as an appropriation is made for this treaty." Having availed himself of the privilege of becoming a citizen of the State where he resided, he no longer remained an "individual" of the Cherokee nation, and thereupon became entitled to a portion of whatever might remain to be distributed *per capita*, as provided for in the treaty, after deducting from the whole fund such sums of money as were properly chargeable thereto.

At the period when the treaty of 1846 was concluded, the petitioner had ceased to be one of the Cherokee nation, and, not being represented by any of the parties to that treaty, he was not bound by it. The tenth article expressly declares that nothing in the treaty contained shall "take away or abridge any rights or claims which the Cherokees now residing in the States east of the Mississippi river had, or may have, under the treaty of 1835 and the supplement thereto." The first *proviso* in the act of 1851 must be construed with reference to the treaty of 1846, and is properly applicable, as in terms it is declared to be, only to the Cherokee nation, or to the individuals *then* composing that nation. To extend the construction of that *proviso* so as to embrace the petitioner would not only be inconsistent with its words, but do violence to the spirit of the tenth article of the treaty of 1846. If, therefore, the settlement, which took place after the treaty of 1846, be unjust or erroneous in any respect, the petitioner, notwithstanding he has received his due proportion of the amount paid under the act of 1851, is still not barred from showing the error or from availing himself of any demand to which its correction may justly entitle him.

The petitioner specifies the following as the errors of which he complains in that settlement: (1) that the United States received credit for the actual expense of subsistence, instead of at the rate of thirty-three dollars thirty-three cents for each Cherokee subsisted; (2) that the United States received credit for the actual expense of removal, instead of twenty dollars for each Cherokee removed; (3) that the United States were not entitled to credit on account of both spoliations and subsistence for more than six hundred thousand dollars, but they received credit for a much larger sum; and (4) that credit was improperly given to the United States for the expenses of the committee appointed under the twelfth article of the treaty. This is not the

precise form of specification of errors adopted by the petitioner, but it substantially embraces, as we understand the petition, his whole complaint.

By the first article of the treaty of 1835, the Cherokee nation ceded their lands east of the Mississippi river, and released all their claims for spoliations to the United States, for the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the subsequent articles. It was agreed to be submitted to the Senate whether, in their offer of five millions of dollars to the Cherokee Indians for all their lands and possessions east of the Mississippi river, claims for spoliations were included; and if they were not, then an additional sum of three hundred thousand dollars was to be allowed for that purpose. The award of the Senate is to be found in the supplementary articles.

The second and third supplementary articles are as follows:

"Article 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river, was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the Senate to be just.

"Article 3. It is, therefore, agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims, of every nature and description, against the government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions, and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund."

So much of the 8th article of the treaty of 1835 as it is necessary now to consider is in these words: "The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the government. Such persons and families as, in the opinion of the emigrating agent, are capable of subsisting and removing themselves, shall be permitted to do so; and

they shall be allowed in full for all claims for the same twenty dollars for each member of their family, and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it."

So much of the fifteenth article of the treaty as it is important now to notice is as follows: "It is expressly understood and agreed between the parties to this treaty that, after deducting the amount which shall be actually expended for the payment for improvement, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds, provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east, according to the census just completed."

The twelfth article of the treaty provides for the appointment of a committee for certain purposes therein mentioned.

It is to be observed that, by the eighth article of the treaty, two modes of removal and subsistence are provided for: the one to be effected by the United States, and the other by such persons and families as, in the opinion of the emigrating agent, were capable of subsisting and removing themselves. Those persons and families were to be permitted to remove and subsist themselves, and in that event each of them was to receive for removal twenty dollars, and for subsistence thirty-three dollars and thirty-three cents. The effect of this article was to create an obligation on the part of the United States to remove and subsist all the Cherokees, except such as might elect and be permitted, in the manner prescribed, to remove and subsist themselves. And it is obvious, from the express language of the eighth article, that the amount to be expended for removal and subsistence was limited only when the latter method of removal and subsistence should be adopted. This article contains no provision as to the party by whom the expense of removal and subsistence was to be borne, or the fund out of which it was to be paid.

The fifteenth article of the treaty expressly declares "that, after deducting the amount which shall be actually expended for the payment for * * * spoliations, removal, subsistence," &c., the "balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee nation east, according to the census just completed." This includes, in express terms, as well removal and subsistence as spoliations, and there is no room for doubt or uncertainty, and nothing left to construction in regard to them. On the contrary, it is clear, beyond dispute or cavil, that the expense of removal and subsistence, as well as of spoliation, was to be borne by the treaty fund; and it is equally clear, as we have already seen, that, if the removal and subsistence were effected and provided for by the United States, then the amount actually expended therefor; or if by the Cherokees themselves, then the sum of fifty-three dollars and thirty-three cents *per* head was to be deducted from that fund. These views so obviously result from the express language of the treaty that it seems to us that there can be no just ground for a different opinion in regard to them.

But, notwithstanding the language of the treaty was thus plain and unequivocal, if the parties have concurred in a different interpretation of it, that interpretation ought to be adopted. This consideration renders it eminently proper that we should review the acts of the parties in relation to the treaty.

Before the treaty of 1835 was ratified by the Senate, a difficulty in regard to its construction arose, and it seems to have been, to a great extent, the occasion of the supplementary articles. We find it stated in the second supplementary article that the Cherokee people had supposed that the sum of five millions of dollars, mentioned in the first article of the treaty, "was not intended to include the cost of removal, or the value of certain claims which many of their people had against the citizens of the United States;" but there is no concession on the part of the United States that the supposition of the Cherokee people was well founded. The fact that it existed, not that it had any just foundation, is stated as the reason why the suplementary article was adopted. If it had been intended that the entire expense of removal and spoliations was to be borne by the United States, there would, as there should, have been a stipulation expressly so declaring. But, instead of this, a certain sum to be paid by the United States for these and other purposes is agreed upon and inserted in the treaty. To the extent of that sum the United States became bound, but no further. It may be said, and perhaps with justice, that this did not amount to a concession of right on either side. It was doubtless supposed that no further difficulty would arise. But, as regards the United States, the most that can be justly urged is, that, in view of the impressions of the Cherokees, they so far yielded to them as to agree to allow them the additional sum of six hundred thousand dollars. There can be no justice or propriety in saying that they either did or designed to do more. On the contrary, the very fact that they limited the sum conclusively shows that they intended thereby to limit the extent of their obligation. Such, it seems to us, is the obvious construction of the supplementary articles.

But further difficulty arose. The treaty of 1835–'36 had been concluded in opposition, it was said, to the will of a large majority of the Cherokee nation. This majority, under the counsels of John Ross, had uniformly refused to recognize that treaty as obligatory upon them, and had obstinately withstood all the efforts of the government of the United States to induce them to adopt it or emigrate under its provisions. In the meantime, within the period limited by the treaty, most of what was called "the treaty party" had emigrated to the west. Finally, the "Ross party," still adhering to the idea that they were in no way bound by the treaty, made a proposition to the United States "to release all claim to their country and emigrate for a named sum of money, in connexion with other conditions, among which was the stipulation that they should be allowed to take charge of their own emigration, and that the United States should pay the expense of" it. But this proposition was never acceded to, either by treaty or legislative enactment. The Secretary of War, in reply to it, said: "If it be desired by the Cherokee nation that their own agents should have the charge of their emigration, their wishes will be complied with,

and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation, which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made to Congress." But the Secretary of War had no authority to act in the premises, except so far as he might do so in execution of the treaty. And the only action which Congress took upon the subject was to pass the act of June 12, 1838, which is as follows:

"That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the treasury not otherwise appropriated, in full for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five, between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to said tribe of Indians by said treaty: *And provided, further*, That the said Indians shall receive no benefit from the said appropriation unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the government."—(5 Stat. at Large, 242.)

The action of the Secretary of War was nothing more than a mere offer, on the part of the United States, to execute, in good faith, so much of the eighth article of the treaty of 1835–'36 as provides that such persons and families as, in the opinion of the emigration agent, were capable of subsisting and removing themselves should be permitted to do so; and the act of Congress was a mere legislative appropriation of one million forty-seven thousand and sixty-seven dollars, to be applied to the purposes therein mentioned. It was obviously consistent with the express terms of the eighth article of the treaty for the Secretary of War to permit the "Ross party," if they could bring themselves within the provisions of that article, to remove themselves. If they availed themselves of this permission, then it followed, as a necessary consequence, that they could only be allowed for all claims for the same at the rate of twenty dollars for each Cherokee so removed, for so the treaty expressly provides. But the Secretary of War had no authority to say, so as thereby to bind the United States, that the expense of their removal would be borne by the United States, or that it would be paid otherwise than as the treaty provided; nor did he undertake to do so. He merely expressed the opinion that the request of the Cherokee nation, that the expense of their removal should be defrayed by the United States, *ought to be granted*, and gave assurance that an application for such further sum as might be required for that purpose should be made to Congress. He complied with his engagement. The whole subject, with his estimates made under a resolution of the House of Representatives, was communicated by the President to Congress. Congress, however, did not concur in the opinion which had been expressed by the Secretary of War, but merely passed the act of June 12, 1838. In the passage

of this act Congress seems to have been governed by the same policy which characterized the supplementary articles. It was simply an appropriation of money for the objects therein mentioned, but nothing more. We do not pause to inquire whether this money was properly applicable to any other objects than removal and subsistence. It is not necessary for us to consider that point.

Before the expiration of the year eighteen hundred and thirty-eight, the entire removal of the Cherokees to their new homes was effected. In August, A. D. 1846, the treaty of that date was made, but the petitioner, not being a party thereto, was not bound by it. This we have already seen. He does not in any way found his claim upon that treaty, but as he has, both in his petition and in argument, referred to it, and to the action of the Senate thereon, it is incumbent upon us briefly to notice both. He correctly states that the third and ninth articles of that treaty establish the basis of settlement with the Cherokee emigration under the treaty of 1835. The ninth article, in declaring what sums shall be deducted from the treaty fund, in express terms includes all sums properly expended under the treaty of 1835 for spoliations, removal, and subsistence, and commutation therefor. By the eleventh article, the question whether the amount expended for subsistence was properly chargeable to the treaty fund was submitted to the Senate. The Senate awarded that, *under the circumstances*, the Cherokee nation were entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the treasury, and that interest at the rate of five *per cent. per annum* should be allowed thereon from the twelfth day of June, A. D. 1838, until paid. The substantial effect of this award seems to be that by the act of June 12, 1838, the United States provided for the payment of the sum of six hundred and eleven thousand one hundred and five dollars and fifty-five cents, part of the expenses of subsistence, and that the residue thereof—to wit, the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents—was not chargeable to the treaty fund. It was professedly not founded upon the construction of the treaty, but upon the peculiar circumstances connected with the transactions which had occurred between the "Ross party" and the United States. It affords but little aid, therefore, in the investigation of this case.

We have thus presented a brief review of the course pursued, as well by the United States as the Cherokees, under the treaty of 1832–'36, and, as regards the questions now under consideration, it presents not a single instance in which they have concurred in an interpretation of that treaty different from that which, as we have seen, is authorized and required by its language, understood in its ordinary sense.

It seems to us, therefore, that the sums expended for removal, subsistence, and spoliations were properly chargeable to the treaty fund;

that the sums actually expended therefor were to be deducted from that fund, and that the expense of removal and subsistence was limited, the one to twenty and the other to thirty-three dollars and thirty-three cents, only in regard to such of the Cherokees as, under the eighth article of the treaty, were allowed to remove and subsist themselves.

We come now to the fourth specification of error, which relates to the committee appointed under the twelfth article of the treaty of 1835–'36. It seems to us that the expense of this committee was a proper charge against the Cherokees. Although it was appointed by the mutual agreement of the parties, yet it did not represent the United States, or act in their behalf, or render any services for them. It was, in the language of the treaty, "a committee on the part of the Cherokees" appointed "to transact all business on the part of the Indians which [might] arise in carrying into effect the provisions of [the] treaty, and settling the same with the United States."

The United States, in concurring in its appointment, did nothing more than agree to recognise it as the authorized agent of the Cherokees. As, then, it represented the Cherokees and acted for their benefit—did their business alone—they alone should bear the expense of it. Nothing short of an agreement on the part of the United States to that effect could render them liable for it; and we look in vain into the treaty for any such agreement. The mere fact that the fifteenth article does not contain a provision in regard to the expense of this committee furnishes no ground whatever for the implication of the liability of the United States for it. If it had been a committee on the part of the United States to represent and act for them, then the omission of any notice of it in the fifteenth article would be conclusive to show their liability for the expense of it. But, as we have seen, it was not a committee of that character. The United States, however, did defray the expense of this committee, and they have been reimbursed out of the treaty fund. But of this the Cherokees can have no just ground of complaint; because, it being a proper charge against them, they were liable for it, and being so liable, it was immaterial out of what fund belonging to them it was paid.

It is not alleged in the petition that the sums for which the United States received credit in their settlement with the Cherokees for spoliations, removal, and subsistence were not actually and in good faith expended.

We are, therefore, of the opinion that the facts set forth in the petition of the claimant do not furnish any ground for relief, and that the taking of testimony in this case shall not be ordered.

Let a judgment be entered accordingly.

IN THE UNITED STATES COURT OF CLAIMS.

To the honorable the Court of Claims of the United States of America:

Your petitioner, Johnson K. Rogers, by birth and blood a Cherokee Indian, and one of those persons of the Cherokee nation who

remained east of the river Mississippi after the making of the treaty of 1835 between the United States and the Cherokee nation, and who were commonly known as the "Eastern Cherokees," petitioning for himself and for and on behalf of all other of said Eastern Cherokees, entitled like and with himself to certain rights hereinafter set forth, under the treaty of 1835, the supplement thereto of 1836, the act of Congress of June 12, 1838, and the several decisions of the Senate of the United States hereinafter mentioned; by this his AMENDED and SUBSTITUTED petition, by leave of the Court filed in the place and stead of the original, most respectfully shows and represents:

That at an early day, long prior to the year 1828, the United States became desirous of purchasing the country owned and possessed by the Cherokee nation of Indians, east of the Mississippi river, in the States of Georgia, North and South Carolina, Alabama, and Tennessee, and of inducing said Indians to remove to and occupy a new country west of the Mississippi.

That by article 7 of the treaty of July 2, 1791, (7 Stat. at Large, 39,) the United States had *solemnly guarantied* to the Cherokee nation all their lands not thereby ceded; which solemn guarantee was repeated by article 6 of the treaty of October 2, 1798.—(Id. 63.)

That prior to the year 1817, a portion of the Cherokee people emigrated to the western side of the Mississippi river, and selected and received, in exchange for *their* lands east of that river, a country upon the Arkansas and White rivers; which exchange was effected by the treaty of July 8, 1817, (Id. 156;) and by that treaty provision was made for taking a census of those of the Cherokees who should determine to remain east of the Mississippi, and of those who had removed or intended to remove; and the United States agreed to give to the latter as much land, west of the Mississippi, as they had received or should receive from the nation east of the Mississippi, acre for acre, as the just proportion due those who had removed or should remove, agreeably to their numbers. And, by article 6, the United States also bound themselves to give to every poor warrior who should emigrate, a rifle-gun and ammunition, a blanket and kettle, a beaver trap; *to aid in their removal*, furnishing boats and provisions therefor; and to pay them the full value of all their improvements which added real value to their lands.

That by the treaty of February 27, 1819, (Id. 195,) the United States accepted a cession of certain lands by the Cherokees, as in full for the lands assigned those who had removed, upon Arkansas and White rivers; and it was thereby agreed, that those who had emigrated, and who were afterwards called the "old settlers," were, in number, one-third of the whole nation.

That by article 8 of the treaty of May 6, 1828, (Id 311,) made between these Western Cherokees and the United States, for settling the boundaries of their country west of the Mississippi, it was agreed by the United States, that to every head of a Cherokee family, then residing in any State east of the Mississippi, who would remove west, should be given a good rifle, a blanket, kettle, and five pounds of tobacco, and to each member of his family a blanket; and also a just compensation for the property he might abandon. And it was further

agreed, *that the cost of the emigration of all such should be borne by the United States*, and good and suitable ways opened, *and provisions procured* for their comfort, accommodation, and support, by the way, *and provisions for twelve months after their arrival at the agency;* and $50 to every head of a family with four persons, who should emigrate from Georgia, &c.

That this provision was continued in full force by the treaty (declared supplementary) of February 14, 1833, (Id. 414;) and by article 17 of the treaty of December 29, 1835, (Id. 486,) it was declared that *all* stipulations in former treaties, not thereby annulled or superseded, should continue in full force and virtue.

That in February, 1835, while the treaties of 1817 and 1828 remained in full force, a delegation of the Eastern Cherokees, then in Washington, proposed to sell to the United States the whole Cherokee country, east of the Mississippi, for $20,000,000; the Indians to remove and subsist themselves, and the United States to pay their claims for losses and spoliations, caused by the adjoining States and their citizens. This proposition being deemed by the President to be too extravagant, the Cherokee delegation proposed that the matter should be submitted to the Senate for its sense upon the question; agreeing that *they* would, as individuals, abide by the award of the Senate, and recommend it to their people.

That this proposition was accepted by the President, with a declaration on his part that he was willing to go as far as the Senate would; and accordingly, the matter was submitted to the Senate for its decision and award upon the question; and thereupon the Senate decided that "a sum not exceeding five millions of dollars should be paid to the Cherokee Indians, *for all their lands and possessions* east of the Mississippi river;" and this award was communicated to the Cherokee delegation by the Secretary of War, on the 6th day of March, 1835; and he then offered (using the terms *claims*, and *lands and possessions*, as convertible terms,) to treat with them for a *cession* of all the *claims* of the Cherokees east of the Mississippi river, on condition that the whole amount of the *consideration* should not exceed the sum of $5,000,000.

That the delegation then requested to be informed whether that sum was intended, as appeared from the letter of the award, to be the consideration for the extinguishment of the Cherokee title to their lands, and for their houses and improvements *alone;* and whether the United States would, *in addition*, pay the expenses of transportation and subsistence in the removal of the Indians, according to the provisions of the treaty of 1828; or whether the expenses of removal, subsistence during removal, and subsistence for twelve months after removal, and for blankets, guns, &c., were to be paid out of and charged against the five millions of dollars. They said that it was *indispensable* that they should be informed on this point, without which they could not treat.

That to this the Secretary of War answered that the $5,000,000 would be in full for their entire cession, and that nothing more would be paid for removal, or for any other purpose or object whatever. And he added, "*In giving to you the full value of your property, the*

United States comply with all the demands of justice upon them. And he informed them that thus the intercourse in writing between them and him was closed.

That the President and Secretary of War then and always afterwards admitted that the $5,000,000 was offered as the *price* of their *lands* and *possessions*, or possessory *rights* and *claims* to their lands *alone*; but claimed that the United States having thus agreed to pay the full value of such lands or claims and possessory rights, the Cherokees had no claim on *any* ground that the United States should *also*, and *in addition*, pay their claims for spoliations, and remove and subsist them. But the Cherokees understood that the award merely fixed the price and value of their rights to their lands, and of their improvements; that the treaty stipulations remained in force, by which the United States were bound to remove and subsist them; and that the claims for spoliations were also to be paid, in addition to the sum of $5,000.

That this question thus arising, the Cherokee delegation declined to treat, suggesting that the proposition, as understood by the President, might be submitted to their nation; and afterwards, on the 14th March, 1835, articles of a treaty were agreed on by *another* set of delegates of the Cherokees, to be submitted to the Cherokee nation for their consideration; by which articles it was proposed that the Cherokees should cede their whole country for the consideration of $4,500,000, and 800,000 acres of land west of the Mississippi; out of which sum of $4,500,000 were to be deducted, as appeared by a schedule thereto annexed, expenses of removal, estimated at $255,000; subsistence, estimated at $400,000; claims and spoliations, estimated at $250,000; and for blankets, rifles, and kettles, $80,000.

That these articles for a treaty were, in the fall of the year 1835, sent out to the Cherokees by a commissioner appointed to treat with them; that, in an address to the Cherokees by the President, also sent therewith, they were informed that the Senate had given their opinion of *the value of the Cherokee possessions;* that the articles provided for their removal *at the expense of the United States*, for their subsistence for a year, for a *gratuity* of $150 to each person, and for *the usual supply* of rifles, blankets, and kettles.

That the commissioner *uniformly* and repeatedly informed the Cherokees that the treaty was to be made "on the basis of the $5,000,000 awarded by the Senate;" * * * that it was to be a treaty for the settlement of all difficulties between the Cherokees and the United States, "and for a cession of all their *lands* east of the Mississippi, on the basis of the award of the Senate *for the same*, being $5,000,000;" and that their delegation, authorized to settle their difficulties, and enter into a treaty for a cession of their entire country, did agree *to sell the same* to the United States for such a sum as the Senate should award; and that the Senate fixed *the price* at $5,000,000.

That the commissioner, advised of the Cherokee understanding as to the meaning and true construction of the award of the Senate, proposed to the Cherokees that if any important points of difference should arise between him and them in regard to that award they should be included in a separate and conditional article, and so be

again brought before the President and Senate for their final determination ; and accordingly he prepared and proposed an article providing that as a question had arisen between them and him whether the Senate *intended* to include in their award, also, the just claims of the Cherokees against the United States, *or the price of their land only*, therefore *that matter* should be again referred to the Senate for its determination ; and if the claims were not intended to be included, ——— dollars should be allowed for claims.

That the Cherokees declined to accept the articles so prepared on the ground that *they* would be bound and the United States would not; but that finally the treaty of 1835 was concluded with a portion of said nation, it being understood that the Senate was to settle the question submitted to it before the treaty should be submitted for ratification.

That, by the letter of said treaty, it was submitted to the Senate to decide whether by their award they intended that the claims for spoliations should be paid out of or over and above the said sum of $5,000,000 ; and if the latter, then an additional sum of $300,000 should be allowed for spoliations; and by the 8th article the United States agreed to remove the Cherokees to their new homes, and subsist them for a year after their arrival there, furnishing steamboats, baggage wagons, and physicians ; or to allow those who should prefer to remove and subsist themselves, $20 a head for removal and $33 33 a head for subsistence, in money.

By article 9 the improvements of individuals and ferries were to be valued and paid for. By article 10 certain sums were to be invested as national funds, certain debts and claims against the Cherokee Nation paid, and $300,000 set apart for spoliation claims. And by article 15 the expenses of removal and subsistence, and the amount of claims for spoliations, were to be paid out of the $5,000,000 ; and, after deducting them, and the amounts paid for improvements, ferries, debts of the nation, &c., the balance was to be equally divided among all the people belonging to the Cherokee nation east, according to the census just then completed.

Which articles 8 and 15 were intended to be conditional and contingent, to a certain extent, in this: that if the Senate should decide that the $5,000,000 was intended by the award to be the price of the lands only, then the 8th article stood unaffected by the 15th, and the United States were bound, over and above the $5,000,000, to pay the spoliation claims and to remove and subsist the Indians, or pay the commutation prices of $20, and $33 33 for each, according to the 8th article of the treaty of 1828, and the 8th article of that of 1835 in question ; by virtue of the provision of the 17th article of the latter, by which *all* stipulations in former treaties, not superseded or annulled by it, were to continue in full force and virtue. But if the Senate should decide that the $5,000,000 were intended to cover and include *not* the price of the land alone, but also the amount of claims for spoliations, and the expenses of removal and subsistence, then the 15th article stood in full and qualified the 8th.

That on the 29th of February, 1836, Senators Cuthbert and King, of Georgia, and King, of Alabama, who had voted for the award,

stated to the President, in writing, that the Senate did not intend that the allowance for spoliations or expenses of removal should be deducted from the sum of $5,000,000 recommended to be offered to the Cherokees as the price of their territory.

That supplementary articles to the treaty were signed on the 1st of March, 1836, by the 2d article of which it was agreed that it should be submitted to the Senate to decide whether that sum was intended to include expenses of removing the Cherokees or the amount of their spoliation claims; and if they should decide that it was not, then such further provision should be made for those purposes as to the Senate should seem just; and, by the 3d article, in the event of such decision, $600,000 was to be allowed the Cherokees, to include expenses of removal, and their claims, &c., and any surplus to be paid over to their education fund.

That the Senate decided that the $5,000,000 was the price of the lands alone, and did not include the spoliation claims nor expenses of removal; the evidence of which decision was, that they ratified said treaty and supplement, including said allowance of $600,000; thus agreeing to pay that as a consequence of an acknowledged legal obligation, the question submitted being, in reality, whether the $5,000,000 was not the price of the land and improvements alone, and not whether it did or did not include any particular charge or item of expenditure; and from the decision that it was it resulted, as a corollary, that it did not include the spoliation claims, expenses of removal, or subsistence.

That when and before the Senate so decided, the letter of Senators King, King, and Cuthbert was before it, as also all the correspondence and negotiations which preceded and led to the treaty and supplement; and the views of the Cherokees and the position assumed by them were well understood by the Senate.

That in the schedule to the original articles signed at Washington and sent out to the Cherokees, the expenses of removal were estimated at $255,000, claims and spoliations at $250,000, and blankets, rifles, and kettles at $80,000; or, together, $585,000; (*Doc. No.* 286, *Ho. of Reps.*, *1st sess. 24th Cong.*, *p.* 39;) so that it was supposed by the Senate that, in appropriating $600,000 to meet these expenditures, they appropriated a just and sufficient sum to meet the legal obligation which was decided to rest upon the United States; and that appropriation or allowance was in nowise intended to limit the extent of that plenary legal obligation.

That this question, thus decided in favor of the positions assumed from the beginning by the Cherokees, was again so decided by the whole legislative power of the United States, and their obligation to remove and subsist them broadly and fully recognized and acknowledged in the year 1838; in which year the Cherokees claimed, as a matter of right, under the treaty of 1835 and the supplement of 1836, that the expenses of their removal and subsistence ought to be defrayed by the United States; and the Secretary of War, when no new treaty had been made, nor even any proposition for a treaty entertained, decided that the position assumed by the Cherokees was correct, and proposed to Congress to make such allowances to the Cherokees as were believed to have been originally intended by the Senate; and,

accordingly, estimated that to remove every remaining Cherokee, at $30 a head, it would be necessary to appropriate, over and above an amount on hand, $435,900; and that to subsist every one, removed and unremoved, for a year, it would be necessary to appropriate $611,105 55, being for 18,335 Indians, at $33 33 a head; which estimates being submitted to Congress, the conclusions of the Secretary were adopted and the legal obligation of the United States recognized, and, by act of 12th June, 1838, the sum of $1,047,067 (being for removals, as estimated, $435,900, and for subsistence for 18,335 persons, at $33 33⅓ a head, $611,167) was appropriated, in full, for all objects specified in the 3d article of the treaty of 1835, "and for the further object of aiding in the subsistence of the Indians for one year after their removal west. And, to recognize and admit, in the amplest terms, the legal obligation as a consequence whereof this appropriation was made, it was expressly provided that no part of that sum should be deducted from the $5,000,000 stipulated to be paid to the Cherokees by that treaty.

That, by the 12th article of the treaty of 1835, it had been stipulated that those individuals and families of the Cherokee nation who were averse to removing and desired to become citizens of the States where they resided, should be entitled "to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita*," as soon as an appropriation should be made for the treaty.

That on the 6th of August, 1846, (9 Stat. at Large, 871,) a treaty was made between the United States and the Ross or government party, the treaty party, and the old settlers of the Cherokees, to which the Cherokees still east of the Mississippi were no parties; and it was expressly agreed by article 10, that nothing therein contained should be so construed as in any manner to take away or abridge any rights or claims which they had, or might have, under the treaty of 1835 and the supplement of 1836.

By article 3 it was admitted by the United States that the spoliation claims *were never justly chargeable to the* $5,000,000, but were to be paid by the United States; and the latter agreed to reimburse to said fund the amount therefor improperly charged to it, and certain other sums improperly charged to it, including sums paid agents of the government; and that the amounts so reimbursed should form part of the amount to be distributed under the 9th article of the new treaty.

To ascertain the amount due the old settlers, (who had emigrated prior to the treaty of 1835,) article 4 provided that they should receive one-third of the balance found, by deducting from the sum of $5,600,000 all the investments and expenditures enumerated in the 15th article of the treaty of 1835, (excluding all extravagant and improper expenditure,) estimating removal and subsistence at $53 33 a head. These western Cherokees claimed that the amount of spoliation claims, and expenses of removal and subsistence, ought not to be charged against the $5,600,000, to ascertain the balance which they were to share; and article 12 provided for submitting that question, as to *them*, to the

Senate; but that body struck out the article, thus making no decision, when, on the 8th of August, 1846, the treaty was ratified.

But as to the *other* parties interested, a different arrangement was made. By article 9, the United States agreed to make a *fair* and *just* settlement of all moneys due the Cherokees, and subject to the *per capita* division, under the treaty of 1835; such settlement exhibiting all moneys *properly* expended under *that* treaty, and embracing all sums paid for improvements, ferries, spoliations, removal and subsistence, and commutation therefor, debts and claims on the Cherokee nation, the 800,000 acres sold to them west of Missouri, the investments in general fund, and all sums which might *thereafter* be properly allowed and paid under the treaty of 1835; the aggregate of all which should be deducted from the sum of $6,647,067, and the balance be paid *per capita* in equal amounts, to *all* the Cherokees, their representatives, &c., residing east of the Mississippi, at the date of the treaty of 1835, and the supplement of 1836.

But this article was qualified by article 11, which provided that the question, whether the one year's subsistence was properly chargeable against the $5,000,000, should be submitted to the Senate for its decision, who should decide whether the subsistence should be borne by the United States or by the Cherokee funds; and, if by the Cherokees, whether it should be charged at more than $33 33 a head; and also the question, whether the Cherokee nation should be allowed interest on whatever sum should be found to be due the nation, and from what date, and at what rate per annum.

Your petitioner, for himself, and the other persons aforesaid, represents, that the Senate had *already* decided, in 1836, that the spoliation claims and expenses of removal were not to be paid out of the $5,000,000. This decision being final against the United States, and a mere corollary from the *real* decision, upon the *real true* point submitted, which was, whether the $5,000,000 was or was not the price of the lands *alone;* that on the 12th day of June, 1838, the Congress and the President, by the act that day approved, had solemnly decided that the United States were bound to pay the whole expenses of removal and subsistence, by appropriating what it was estimated would cover *the whole*, and by providing that the amount thould not be charged against the $5,000,000; and that, by the treaty of 1846, no *new* question, but *the same* question, under the treaty and supplement of 1835–'36, was *again* submitted to the Senate; and it was made the judge, selected by the United States to decide *this* question against or in favor of them.

On the 7th of August, 1848, by act of that date, (9 Stat. at Large, 339,) the proper accounting officers of the treasury were authorized and required to make a fair and just statement of the claims of the Cherokee nation, according to the principles established by the treaty of 1846.

And afterwards the Senate referred to the Committee on Indian Affairs the questions submitted to itself by the treaty of 1846. The committee decided that the charge for subsistence should be borne by the United States. They based their decision, not upon the face of the treaty of 1835, and the supplement, but upon the action of Con-

gress in 1838, holding that action to be a clear legislative affirmance of the terms offered by the Cherokees, and acceded to by the Secretary of War, and a new consideration offered the Indians to induce them to abide by the terms of the treaty. And the committee held that $800,528 31 having been paid for subsistence, and charged against the fund, while $611,105 55 only had been appropriated for that purpose by the act of 1838, the balance, or $189,422 76 was still due by the United States.

Your petitioner submits that, while the *conclusions* of the committee were right, the *grounds* of these conclusions involved some error. He respectfully submits that there is really no ambiguity in the treaty of 1835, nor was there ever any variety of construction placed upon it, because *its* construction was never a question; that after the Senate decided the question submitted to it in 1836, there should no longer have been any question that the United States were bound to subsist the Indians, because their obligation to do *that* stood on precisely the same ground as their obligation to remove them, which the Senate then expressly decided they were bound to do, for the *question* submitted was, whether the $5,000,000 was the price of the land *alone;* and the *award* was, as it was bound to be, *in accordance with the submission;* and of that decision, as made, that the United States must *remove*, and that they must *subsist* the Indians, were equally corollaries.

And so it was decided by the act of 12th June, 1838. For he respectfully submits that the sum allowed thereby was no *new* contract nor new consideration. For he avers that the Cherokees never asked any new favor, grace, or concession; but always stood upon the letter and spirit of the award, and claimed that, and the stipulations to remove and subsist them, contained in the treaty of 1828, and no more and no less—in 1850 as in 1836; and Mr. Poinsett, in deciding (a decision affirmed by Congress) that the United States *ought* to remove and subsist them, expressly says that there had been not only no new treaty, but no propositions even entertained for a new treaty.

But your petitioner, having said this by way of protestation against the conclusion that he assents to the *argument* of the committee, relies upon their *decision* alone as embodied in the resolution reported by them, and which resolution, adopted by the Senate, became *its* judgment upon the question submitted—final and forever conclusive as against the United States, and estopping them ever again to deny their liability; and he submits that it might be unjust to the Senate to presume that it adopted the *reasoning*, and *argument*, and *grounds* of judgment of the committee, and so he pleads and relies upon the judgment itself.

And he further represents that the question submitted to the Senate was, "whether the amount expended for the one year's subsistence was or was not *properly chargeable* to the treaty fund, and whether it should be borne by the United States or the Cherokee funds;" and the decision on that question was, that, under the circumstances, that amount (so far as unprovided for by appropriation) "*was* improperly charged" to the treaty fund. In accordance with which the act of Congress of September 30, 1850, (9 Stat. at Large, 556,) appropriated $189,422 76 "for additional amount for expenses paid for subsistence,

and improperly charged to the treaty fund, under Senate award of 5th September 1850, and 11th article of treaty of 1846."

And he further represents that that decision was made in favor of the eastern Cherokees, including himself, as well as of those who had emigrated, because the former were entitled to receive their proper share of the balance to be ascertained by the accounting officers; which balance was to be increased or diminished, according as the Senate should decide, one way or the other. And, also, that even if the act of 1838 *had* been, as the Senate committee held it, a *new* concession, instead of being, as Mr. Poinsett held, and as Congress, by its action, recognized, merely carrying out the original intention of the Senate, still it was as much a concession to and in favor of himself and those for whom he petitions here, as for those who decided to emigrate.

He further represents that the accounting officers charged against the said sum of $6,647,067—for improvements, $1,540,572 27; for ferries, $159,572 12; for spoliations, $264,894 09; for removal and subsistence, $2,823,192 93; for physicians, matrons, &c., $32,003 91; for government agents, &c., $96,999 42, (which amount the Senate decided was for improper and extravagant expenditures, and must be borne by the United States;) for national debts, $18,062 06; claims of United States citizens, $61,073 49; compensation of Cherokee committee, $22,212 76; value of land west of Missouri, $500,000; and amount invested as general fund, $500,880; making in all $6,019,463 05; leaving a balance due the Cherokees, according to the 9th article of the treaty of 1846, of $627,603 95; to which, adding the sum of $96,999 42, rejected as aforesaid by the Senate (the judge in that behalf) as improperly charged, there was found due the Cherokees $724,603 37, and, adding to that $189,422 76, found due on subsistence account, the aggregate sum to be distributed *per capita* was found to be $914,626 13, which was appropriated and paid in 1850; and of it your petitioner, and those for whom he appears and petitions, received their share.

Your petitioner further represents that the provision in the treaty of 1828, by which the United States were bound to remove and subsist the Cherokees who would remove, could not be abrogated and rescinded, unless by the consent of both contracting parties; that the award of the Senate, if it had been binding on the Cherokees, did not do so; and that by the letter of that award, which, being entirely plain, admitted of no *construction*, the offer made to the Cherokees was simply to give them $5,000,000 for their lands, leaving the eighth article of the treaty of 1828 untouched; that when the Cherokees waived their strict legal rights to insist on the letter of that award and of the treaty of 1828, and submitted to the Senate to say whether its letter expressed their intention, and when that body decided that it did so, there was a final decision against the United States as to spoliation claims, removal, and subsistence; of which decision, those of Congress in 1838 and of the Senate in 1850 were but reiterations and repetitions.

And so he submits that in the account against the Cherokees, as made out under the treaty of 1835–'36, by the accounting officers, even when corrected by the Senate committee, it was erroneous to charge against the $5,000,000 the amount of spoliations, and the expenses of

removal and subsistence; and he submits that, in stating the account, the sum of $5,000,000, the price of the lands, should have been kept entirely separate from the amounts appropriated for other objects; and that against that sum should have been charged, *only*, the value of improvements and ferries, the debts of, and claims against, the Cherokees; the price of the land west of Missouri, and the amount invested as the general fund of the nation; and that, deducting these *only*, the balance was the proper amount to be distributed *per capita;* that *no part* of the charges for removal and subsistence, or of the amount of spoliation claims, should have been taken into account; that the compensation of the Cherokee committee should not have been included, because, they being agents employed by the Cherokees, the United States had no right or business to fix and pay their compensation, and if they chose voluntarily to do so, could not demand repayment thereof from the Cherokees; because the treaty of 1835–'36, contained no provision charging their compensation upon the price of the land, or providing for its payment in any way; and because it was a matter with which the eastern Cherokees had no manner of concern, nor were the services of the committee at all rendered to *them;* and therefore their compensation should not be charged against the price of the land, because by that means the eastern Cherokees would be compelled, in part, to pay it; and that the subsistence furnished those who had emigrated *after* the first year was not furnished under or in consequence of any provision of the treaty of 1835–'36, nor had the eastern Cherokees anything to do with it, but it was furnished to individuals who had no power to agree, nor had the nation west any power to agree that it should be paid out of the price of the land, and so the eastern Cherokees be compelled to contribute to the support of persons other than themselves.

Your petitioner further represents that in the account, as made out by the accounting officers, the amount invested in the general fund is stated to be $500,880, whereas the treaty of 1835–'36 authorized the investment of $500,000 only; and no more could, for such investment be, under the 15th article of the treaty, deducted from the price of the land, to ascertain the balance to be divided *per capita;* and therefore he claims that said sum of $880 shall not be charged in making up the account.

Your petitioner further represents that the Senate committee, to ascertain the amount still due the old settlers, deducted from the sum of $5,600,000 the items specified in the 15th article of the treaty of 1835, calculating removal and subsistence at $53 33⅓ a head, for 18,026 persons, including also spoliations and the compensation of the Cherokee committee; all which deducted left a balance of $1,571,346 55; one-third of which, or $523,782 18, they allowed the old settlers or western Cherokees, and the same was appropriated and paid them.

And the accounting officers having found a balance due the Cherokees of $627,603 95, the committee added to that the sum of $96,999 31, expenses of agents, &c., improperly charged to the Cherokees, and so stated the true balance due the Cherokees to be $724,603 37.

Then deciding that subsistence was improperly charged against the treaty fund, they said that the entire expense of removal and subsistence amounted to $2,952,196 26, of which $972,844 78 was expended for subsistence; that, of that, $172,316 47 was furnished the Indians *after* the first year, on the understanding that it was to be deducted out of the moneys due them under the treaty; deducting which, there remained $800,528 31 paid for subsistence, and charged to the aggregate fund; that of this sum, the United States, in 1838, provided for the payment of $611,105 55, leaving unprovided for the sum of $189,422 76 improperly charged against the treaty fund; adding which to the balance of $724,603 37, they obtained the aggregate of $914,026 13, as due the Cherokees; which sum was appropriated and paid.

Your petitioner represents that these settlements were made upon bases which, though incorrect, and greatly to the loss and injury of the old settlers and other parties to the treaty of 1846, had been consented to by them all, and so settled the whole matter as far as they were concerned, though they lost largely thereby; but that he and those for whom and himself he petitions were in no wise bound by *their* agreements, nor concluded or affected by said settlements; into the merits of which, therefore, he does not inquire.

But, conscious that he and those for whom he now petitions were entitled still to a large amount under the treaty of 1835–'36, he petitioned Congress for relief in the premises, by petition presented to the House of Representatives, and there referred to the Committee on Indian Affairs; basing the claim upon the settlement made with the old settlers as sufficiently favorable to the United States, and supposing that Congress would be willing to settle with them on that basis, and claiming thereunder as follows, viz., that the Senate had found a balance of $1,571,346 55 due upon the basis of the 4th article of the treaty of 1846, as balance of the sum of $5,600,000 appropriated by the treaty of 1835–'36, and of which they allowed the old settlers one-third; that, deducting from this balance of $1,571,346 55 the sum of $914,026 13 paid in 1850, and adding $22,212 76, compensation of the Cherokee committee, and $25,414 09—an amount greater than the $600,000 provided for removal and spoliations in the third supplemental article, and improperly deducted—there was obtained $704,647 16 as the balance, of which the eastern Cherokees were entitled to their proportionate share.

And a census having been taken in the year 1851 of all the Cherokees entitled to share *per capita* under the treaty of 1846, and the whole number, east and west, having been found to be 16,231, and that of the eastern Cherokees 2,133, the above balance to be divided was, for each of the 16,231 persons, $43 43, or, for the 2,133 eastern Cherokees, $92,625 19, on which interest was claimed, at 5 per cent. per annum, from the 12th day of June, 1838, until paid.

In favor of the claim so stated, a report was made by the Hon. Mr. Caldwell, of North Carolina, for payment of principal and interest, which was unanimously adopted by the committee; but it not being called for reports at that session, the report was not submitted to the House.

At the first session of the 33d Congress, the claim, in the same shape, was again presented to the House, and referred to the Committee on Indian Affairs; and on the 20th of March, 1854, the Hon. Mr. Grow, from that committee, made a report in favor of paying the principal, with interest, from December 14, 1852; and he offered an amendment to the general Indian appropriation bill, directing its payment, which passed in committee of the whole by a considerable majority, but was lost in the House.

The claim was afterwards, in the same shape, presented in the Senate, and referred to the Committee on Indian Affairs, by whom the report of the Hon. Mr. Grow was adopted, and the Hon. Mr. Sebastian offered an amendment to the general Indian appropriation bill for its payment, which the Senate unanimously adopted; the bill was returned to the House, and it refused to concur in the amendment; the Senate insisted on the amendment, and it went to a committee of conference, where it was finally lost.

Your petitioner also states that on the 5th of June, 1854, the Hon. Mr. Hunter, chairman of the Committee of Ways and Means, addressed a letter to the Secretary of the Interior, asking his opinion as to the merits of the claim. That letter was referred to the Commissioner of Indian Affairs for a report, and, on the 20th of the same month, the Secretary transmitted the report of the Commissioner, in which he declined to express an opinion, on the ground that it might be deemed discourteous to the Senate and the Committee on Indian Affairs of the House, both of which had already passed judgment on the claim.

At the 2d session of the same Congress a supplemental memorial was presented in the House, and referred to the Committee on Indian Affairs, which, under a joint rule, resumed the consideration of the claim as unfinished business, adopted the former report of the Hon. Mr. Grow, and instructed him to present it to the House.

And your petitioner herewith files copies of the said memorials, and of the report of the Hon. Mr. Grow, including the report of Mr. Senator Sebastian, and prays that they may be taken and considered as parts of this petition.

And the petitioner further adds, that on the 11th of January, 1855, the Commissioner of Indian Affairs gave the Hon. Chairman of the Committee of Ways and Means his opinion against this claim, on grounds utterly untenable, and an entirely mistaken view of the nature and basis of the claim, and of the facts on which it depended.

The House report of 1854 thus states the claim of the eastern Cherokees:

Amount to be paid under treaty of 1835	$5,600,000 00
Deductions ($4,028,653 45—$22,212 76)	4,006,440 69
Leaves for *per capita* distribution	1,593,559 31
Whereof the Cherokees east have received their proportion of	914,026 13
	679,533 18

Brought forward		$679,533 18
Then the committee says that no part of the amount of spoliation claims or expenses of removal *could be* charged to the Cherokees; $600,000 was appropriated for that; but the *amount* really was:		
Removals	$360,520 00	
Spoliations	264,884 09	
	625,414 09	
So that there was improperly deducted from the $5,000,000		25,414 09
To be divided *per capita*		704,947 27
Whole number entitled, 16,231, or $43 43 per head. No. of eastern Cherokees, 2,133, or at $43 43 each		92,625 19

Your petitioner submits that this is evidently wrong; for Congress afterwards agreed that the United States *ought* to pay, and provided for paying of, the above deductions, and for expenses of removal and subsistence, $1,047,067. Of this amount, the eastern Cherokees were equally entitled to their proper share. It went to reduce by so much the charges against the price of their land. Therefore, on the principles of the House report, the account would be stated thus:

Amount to be paid under treaty of 1835 and act of 1838,	$6,647,067 00
Deductions, as per House report	4,006,440 69
Leaves for *per capita* distribution	2,640,626 31
Afterwards appropriated and distributed	914,026 13
To be divided *per capita*	1,726,600 18
Whole number entitled, 16,231, or $106 38 each. No. of eastern Cherokees, 2,133, at $106 38 each is...	226,898 87

But your petitioner does not contend for this, because he admits that the basis of settlement with the old settlers, assumed in the treaty of 1846, was no proper basis for a settlement with the eastern Cherokees, but proceeded upon views peculiarly applying to the old settlers alone.

Your petitioner submits that the Senate and Congress having, in favor of the eastern as well as the western Cherokees, admitted the liability of the United States to pay the year's subsistence, and having in fact *paid* the whole, by the payment, first, of $611,167 in 1838, and $189,422 76 in 1850, it cannot be claimed that any portion thereof should be charged against the $5,000,000, in settling with your petitioner and those whom he represents.

But, if the subsistence *were* properly so chargeable, then the account would stand thus:

Price agreed for land		$5,000,000 00
Proper debts, as per preceding account...	$2,779,279 94	
Subsistence, 18,026 Indians, at $33⅓ a head	600,866 66	
Paid in 1850	914,026 13	
		4,294,172 73
		705,327 27
Share of eastern Cherokees, as 2,133: 16,231, or		92,756 42

So that, even charging the commutation price for subsistence to the Cherokees, there is due to the eastern Cherokees an amount a little larger than that reported by the House committee; and he submits that it cannot be disputed that the Senate, in 1836, *at least*, decided that the expenses of *removal* and the amount of *spoliation claims* were to be paid by the United States; for *they* were within *the very letter* of the submission to them by the treaty.

But he respectfully urges that the decision also, in fact, included the *subsistence;* and that if it did *not*, the liability of the United States for that existed under the treaty of 1828, and was decided by the act of June, 1838, and by the judgment and decision of the Senate in 1850, and by the actual payment thereof by Congress; and therefore he submits that the account with the eastern Cherokees is properly stated as follows:

Purchase-money of land in account.

Price agreed to be paid		$5,000,000 00
To be debited as follows:		
1. For improvements	$1,540,572 27	
2. For ferries	159,572 12	
3. For debts and claims on the nation	79,135 55	
4. For price of land west of Missouri.	500,000 00	
5. Invested in national fund	500,000 00	
		2,779,279 94
Balance of price due up to 1850		2,220,720 06
Then paid by act of September 30, 1850, (of which sum the eastern Cherokees received their share)		914,026 13
Still due and to be divided, (as to them)		1,306,693 93
Whole number of persons to share it 16,231, $80 50$\frac{6}{10}$ each.		
Number of eastern Cherokees 2,133, is, at $80 50$\frac{6}{10}$		171,719 29

And that the United States are still in arrears upon the spoliation, removal, and subsistence account, appears as follows:

Spoliation, removal, and subsistence account.

Removal, subsistence, and commutation therefor.....		$2,823,192 93
Deduct subsistence after one year.....	$172,316 47	
Deduct goods for poor Cherokees.....	2,765 84	
		175,082 31
		2,648,110 62
Physicians, matrons, medicines, &c.,.....		32,003 91
Spoliation claims.....		264,894 09
		2,945,008 62
Appropriated against this:		
In 1836.....	600,000 00	
In 1838.....	1,047,067 00	
In 1850.....	914,626 13	
		2,561,693 13
Balance unappropriated.....		383,315 49

And so your petitioner represents that he and those for whom he petitions are entitled to receive from the United States, on account of the premises aforesaid, the sum of $171,719 29, under the treaties of 1828 and 1835, and the supplement of 1836.

And he further represents that the 12th article of the treaty of 1835 provided that those Cherokees who determined to remain east of the Mississippi should be entitled to receive their due portion of all the personal benefits accruing under that treaty, for their claims, improvements and *per capita*, as soon as an appropriation should be made for said treaty.

That by the treaty of 1846 it was submitted to the Senate to decide "whether the Cherokee nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date, and at what rate per annum;" upon which submission the Senate decided "that interest, at the rate of five per cent. per annum, should be allowed upon the sums found due the eastern and western Cherokees, respectively, from the 12th day of June, 1838, until paid;" which was thus settled by the Senate as a general principle, under the treaty of 1835–'36.

Wherefore, the petitioner, for himself and those in like case with himself, for whom he petitions, prays that this, their claim, being by this honorable court considered, it may be by the court here decided that they are entitled to be paid by the United States the said sum of $171,719 29, with interest from that date, at the rate of five per cent. per annum; to be divided equally among said 2,133 persons, or their proper representatives; and that this court may so report to Congress, with the proper bill to carry said decision and decree into effect.

JOHNSON K. ROGERS,
For himself and all other eastern Cherokees.
ALBERT PIKE,
Attorney for Petitioner.

IN THE COURT OF CLAIMS.

JOHNSON K. ROGERS, for himself and others, *vs.* THE UNITED STATES.

Argument for Petitioner.—On re-hearing.

The treaty of 1828 between the United States and the Cherokees provided that, to every Cherokee head of a family who would emigrate should be given certain articles, and a just compensation for the property he might abandon; that the cost of emigration of all should be borne by the United States, good and suitable ways opened, provisions procured for their comfort, accommodation and support; and provisions for twelve months after their arrival west.—(7 Stat. at Large, 313.) No time was limited for this. The treaty of 1833 (Id., 416) was supplementary to this, and left it in full force.

It was still in full force in 1835; and the treaty of 1835 (Id., 486) expressly provides that "all stipulations in former treaties, which have not been superseded or annulled by this, shall continue in full force and virtue."

On the 25th of February, 1835, the Cherokee delegation proposed to treat on the basis of a gross sum being allowed for all their lands, the United States paying "for a cession of its territory" $20,000,000, continuing them in possession for five years, paying their losses caused by the acts of adjoining States and their citizens, and indemnity for certain other claims.—(Doc. No. 286, Ho. of Reps., 1st sess. 24th Cong., 127, 128.)

These terms being considered too extravagant, they reminded the President, on the 27th February, 1835, that he had often said he would grant them as liberal terms as the Senate or the friends of the Indians would be willing to allow; and they said, "we would therefore respectfully ask that our propositions be submitted to the Senate by the President in order that the sense of that honorable body may be had on them.—(Id., 129.)

On the 16th February, 1835, the Secretary of War had informed them that the President was "willing * * * to allow you a gross sum for your claims, and leave to your own people all the arrangements for their removal and ultimate residence."

On the 19th of June, 1834, a treaty (which was not ratified) had been concluded with some of the Cherokees, by which it was agreed to cede all the national lands for divers annuities and payments, and the United States agreed to remove the Cherokees and subsist them for one year, and also to furnish them with rifles, blankets, &c., under the treaty of 1828.—(Id., 134.) The improvements of the Indians, and by a supplement their ferries, were to be paid for. Each Indian emigrating before October 15, 1835, to receive $60, and each within a year thereafter $25.—(Id., 136.)

On the 28th February, 1835, the delegation requested "that the subject be referred to the Senate for its sense on the question, and again reminded the President that he had often told them that he was disposed to treat them with liberal justice, and would go as far as the

Senate would allow him in regard to money matters.—(Id., 141.) And they said that they were prepared "to abide the award of the sense of the American Senate" upon their proposition, and to recommend the same for the final determination of their nation.—(Id.)

On the 6th March, 1835, Mr. Cass, Secretary of War, wrote to the delegation that, in their letter of the 28th, they had stated their readiness to accept for themselves, and recommend their people to accept, "such a sum for their claims east of the Mississippi river as the Senate of the United States might deem just." Claims east of the Mississippi river necessarily meant their possessory rights to the land and their improvements. Choses in action have no locality. That is the meaning of the word claims (for which the President was willing to allow a gross sum) mentioned in Mr. Cass's letter of 16th February.

And the Secretary said: "The Senate have, by a resolution, stated as their opinion that 'a sum not exceeding five millions of dollars should be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river.' "

Thus the Secretary showed that he understood claims and lands and possessions to be convertible terms. Nothing is said about claims of damages for spoliations, nor of removal and subsistence, which the United States were already bound by the treaty of 1828 to meet and pay whenever the Cherokees would emigrate; and they were also bound by the same treaty to pay each the value of his possessions. The Senate award fixed the value of those possessions.

He then proceeded to say that the President was willing to enter into a negotiation with the Cherokees for the cession of all their claims east of the Mississippi on condition that the whole amount of consideration to be given should not exceed $5,000,000.—(Id., 143.) These are terms which are appropriate to nothing but a sale of property, or a transfer and assignment of claims.

He further said that he was ready to receive propositions concerning the stipulations to be embodied in a treaty for the protection of private rights, and for such arrangements as might be necessary for the removal and re-establishment of their people. He stated the President's desire of doing justice to them, and providing for the satisfaction of their claims.

On the 6th of March the delegation requested to be furnished with all the proceedings of the Senate, that they might fully understand its action.

And they inquired whether they were to understand that the $5,000,000 resolved by the Senate to be paid for their lands and possessions east of the Mississippi embraced also expenses of removal, subsistence for a year, blankets, guns, &c.; or whether it was, as on its face appeared, an offer of that sum for their title to their lands, their improvements and houses; and whether the United States would, in addition, pay expenses of removal, &c., as provided for in the general plan for the Cherokee removals by the treaty of 1828; and also whether additional country west would be given them.—(Id., 143–'4.)

They said: "It is indispensably necessary to candor and justice that all these points should be clearly understood on both sides, and it is

utterly impossible for us to proceed further until we do understand them."—(Ib.)

On the 7th of March, 1835, the Secretary answered: "The sum of $5,000,000 which is offered for your claims east of the Mississippi, will, as I have already informed you, be in full for your entire cession" * * [That he had already informed them; and that they knew. That was not what they had inquired.] * * "Nothing more will be paid for removal, or for any other purpose or object whatever. In giving to you the full value of your property, the United States comply with all the demands of justice upon them. This letter closes the intercourse in writing between us." * * [That was the answer to their question. It *admits* that the $5,000,000 was simply the value of their property; and claims, in effect, that the treaty of 1828, so far as it bound the government to remove and subsist them, was no longer in force.]—(Id , 144, 145.)

In their answer of 9th March, the delegation protested against any treaty being made with a rival delegation, and proposed that the matter be referred to the consideration of the nation itself.—(Id., 145–'6.)

On the 14th of March, 1835, articles of treaty were drawn up at Washington, and signed by the rival (or *Ridge*) delegation, in accordance with the President's and Secretary's construction of the Senate's award. At the end of it was a schedule, showing how the $5,000,000 was to be applied—$255,000 to expenses of removal, $400,000 to subsistence, and $250,000 to claims and spoliations; and for blankets, rifles, and kettles, $80,000. This was probably the estimate on which $600,000 was afterwards appropriated for spoliations and removals.—(Id., 32 to 39.)

These articles were sent out to the Cherokees, by a commissioner, with a letter or talk from the President, in which he said: "The Senate of the United States have given their opinion of the value of your possessions—and this value is insured to you in the arrangement which has been prepared;" and he said, that the stipulations provided, * * 3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of $150 to each person.—(Id., 40.) [It must have sounded strangely to the Indians to be told that they were to be removed at the expense of the United States, and receive a gratuity of $150 each, when, as the articles and schedule showed, they were to pay these to themselves, out of the price of their land.]

On the 14th of October the commissioner addressed his first communication to the Cherokees. He told them that he was prepared "to enter into negotiations for the settlement of all the difficulties between the Cherokees and the United States, and for a cession of all their lands east of the Mississippi, on the basis of the award of the Senate for the same, being five millions of dollars."—(Id., 63.)

But he did not submit to them the articles sent from Washington, because he understood there were objections to some points, which he said he had the power to alter; and that he was disposed to make a treaty as favorable to the Indians, and as satisfactory as his instructions would enable him to do.—(Id., 63.)

He was informed, in reply, that the Cherokees would not accept the treaty already prepared, and was invited to offer new terms.—(Id., 64.)

On the 17th of October the commissioner declined to treat with the authorities of the nation, declaring their constitution and civil organization to be nullities, and appealed to the people at large. But he invited the appointment of a committee to negotiate and settle the details of a treaty, "on the basis of the five millions."—(Id., 65, 66.)

He said, that the Ross delegation at Washington were authorized to settle all the difficulties of the Cherokees with the United States, "and enter into a treaty for the cession of their whole country;" and that they did agree to sell the same to the United States for such a sum as the Senate of the United States should award. The Senate fixed the price at "five millions;" and he said that he was sent there "to conclude a treaty on the basis of the five millions."—(Id., 66.)

And he said, that if there should be "any important points of difference between the Cherokees and commissioners, in regard to the award of the Senate, they could be included in a separate and conditional article, by which they would again be brought before the President and Senate for their final determination."—(Ib.)

The Cherokees afterwards appointed twenty persons as a delegation to make a treaty.—(Ib.)

The commissioner then submitted an article, by which the Cherokees were to cede "all their right and title to all their lands east of the Mississippi river," and "to accept in full for all their claims against the United States, of every kind and nature whatsoever," the sum of $5,000,000, "according to the award of the Senate of the United States," to be paid as detailed in the following articles. And the article went on to say, that as a question had arisen "whether the Senate of the United States intended to include in the award also the just claims of the Cherokee people against the United States, or the price of the land only, therefore it was agreed that that matter should be again referred to the Senate for their determination; and if the claims were not intended to be included, then there should be allowed ——— dollars for claims; but if the Senate would not allow that additional amount, it should not invalidate the treaty.—(Id., 88.)

The Cherokees answered, that the terms proposed were the same which their people had already rejected; that the provision about their just claims was only conditional, and dependent on the approval of the Senate, who, to judge from the Secretary's letter, would be sure to disapprove. That thus the Cherokees would be bound, and the United States not. They therefore thought that no treaty could be made, and further negotiations would be useless; and so it was unnecessary to speak on other points, which otherwise it might be expedient to explain.—(Id., 90.)

Afterwards, the commissioner drew up the articles of a treaty. The first article was precisely as cited.—(Id., 94.)

By a subsequent article, claims of the Cherokees for spoliations were to be ascertained and paid by the United States.—(Id., 96.) The amount of these claims and expenses of removal and subsistence to be deducted from the consideration money allowed by the treaty.—(Id., 98.)

On the 31st October the delegation informed him that the propo-

sitions remained substantially the same as before; and that they were going to Washington, there to make a treaty.—(Id., 99.)

After they went to Washington, some of the Cherokees were got together, and the treaty of 1835 was made.

The journal of the Cherokee council which made it states, that "it was agreed by the commissioner that there should be a certainty on the subject of claims before the treaty was submitted to the Senate."—(Id., 113.) Fourteen thousand nine hundred and ten Cherokees signed a protest against this treaty, as made by unauthorized persons; and the national council and committee did the same.—(Id., 114, 115.)

The treaty of 1835 was made on the 29th day of December. Its first article states the question submitted to the Senate to be, whether the $5,000,000 was to include the amount of claims for spoliations.

The supplementary articles, signed March 1, 1836, enlarge the question to be submitted. They state the Cherokee opinion to be, that the award of the Senate was not intended to include the amount required to remove them, nor the spoliation claims; that this opinion had been confirmed by that of certain senators who had voted on the question; that the President was willing to refer the subject to the Senate for their consideration; and that the question to be decided was, whether the $5,000,000 included expenses of removal and spoliation claims. If not, further provision was to be made, and $600,000 allowed for expenses of removal and all claims.

On the 29th February, 1836, Messrs. Cuthbert and King, of Georgia, and King of Alabama, stated to the President, in writing, that the Senate "did not intend that the allowances for spoliations or the expenses of removal should be deducted from the amount of $5,000,000, recommended to be offered to the Cherokees AS THE PRICE OF THEIR TERRITORY; and that in their opinion the Senate would readily add $600,000 to the $5,000,000, to meet those two expenditures."

This proves several things:

1st. That the Secretary did not correctly state the Senate resolution when he represented it as expressing the opinion that $5,000,000 might probably be allowed for the CLAIMS of the Cherokees.

2d. That the Senate meant to give the $5,000,000 for the territory of the Cherokees. Subsistence, then, stood on the same footing as expenses of removal. If the United States was to pay one, for the same reason it was to pay the other.

3d. The $600,000 was not given as a finality, but it was the concession of a right, and to meet expenditures for which the United States were bound.

4th. It was a fraud on the Cherokees to state the purposes for which this $600,000 was given, as they are stated in the 3d article of the supplement; that is, for all claims of every nature, &c., reservations, pre-emptions, &c.

The Senate ratified the treaty and supplement on the 23d of May, 1836. By that they decided the point in issue, in favor of the Cherokees, that the $5,000,000 was for their lands alone. Everything in the treaty contrary to that, or based on the contingency of a contrary decision, was thereby expunged; and the obligation of the United States to remove and subsist the Indians, or pay the commutation, and

to pay the spoliation claims, remained perfect and intact. They made a partial appropriation for these purposes, and in 1838 another; neither was in full, and both were not sufficient.

The letter of Messrs. Cuthbert, King, and King, was before the Senate when they decided the question submitted to them. If the statement contained in it had not been correct, it would, of course, have been promptly repudiated.

The Cherokees were asking no concession, favor or compromise. They never have done that to this day; they have always stood on the award of the Senate. They claimed what they did as a matter of right. It would be a very arbitrary assumption to say that a gratuity was given them when they asked none, but stood on their strict rights under the award and the treaty of 1828, and that of 1835 also, if the decision was in their favor. It was in their favor. The obligation was admitted. The appropriation RESULTED from that.

Treaty of 1835, (7 *Stat. at Large*, 478.)

PREAMBLE. The Senate had advised "that a sum, not exceeding five millions of dollars, be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river.

The submission to the Senate is said to have been "to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands."

ART. 1. (479.) The Cherokees "cede, relinquish, and convey, all their lands," "and release all their claims upon the United States, for spoliations of every kind," in consideration of $5,000,000, to be expended, paid, and invested, as agreed. But as a question had arisen, whether by the award the Senate had "included and made any allowance or consideration for claims for spoliations," the United States agreed that *that question* should be again submitted to the Senate for their consideration and decision; and, if no allowance were made for spoliations, then an additional sum of $300,000 should be allowed for the same.

ART. 8. The United States agreed and stipulated to remove the Cherokees to their new homes, (west of the Mississippi,) and to subsist them one year after their arrival there, furnishing steamboats, wagons, and physicians.

Those who should remove themselves to be allowed for each member of their family, for expenses of removal, $20, and for the year's subsistence $33 33.

ART. 9. Cherokee improvements and ferries to be valued, and out of such value their just debts (of individual Indians) to be paid. Each Indian to be furnished with money enough to enable him to remove; the balance of their dues to be paid west of the Mississippi. Missionary establishments to be valued, and paid to the missionaries.

ART. 10. The President to invest as follows:

For general fund, in addition to existing annuities	$200,000
Orphans' fund	50,000
School fund	150,000

$60,000 appropriated to pay claims of citizens of the United States against the Cherokee nation.

$300,000 to pay claims of Cherokees for unsatisfied spoliations.

ART. 12. Individuals and families not wishing to remove "shall be entitled to receive their due portion of all *the personal benefits* accruing under this treaty for their claims, improvements, and *per capita*," so soon as appropriation made for the treaty.

$100,000 to be expended for poor Cherokees.

ART. 15. After deducting the amount actually expended for payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the nation, and the additional quantity of lands, and goods for poor Cherokees, and the sums to be invested for general national funds; the balance to be divided equally among all the people belonging to the Cherokee nation east, according to the census just then completed; and those who had removed to be paid for their improvements, where entitled to the benefits of the final treaty.

Then came the letter of Messrs. Cuthbert, King, and King. The Cherokees found that the question to be submitted to the Senate was not fairly and fully stated in the treaty, and they *widened* it by the supplementary articles afterwards agreed upon, so as to make it include expenses of removal; those expenses and their subsistence occupying a common ground.

Supplemental Articles, March 1, 1836.—(488.)

ART. 1. The pre-emptions and reservations in articles 12 and 13 relinquished.

ART. 2. The Cherokees having supposed that the $5,000,000, given as the value of the Cherokee lands and possessions, was not intended to include the amount required to remove them, nor the value of their spoliation claims, and that opinion being confirmed by some members of the Senate, and the President being willing that this subject should be referred to the Senate for their consideration, and, if it was not so intended, that such provision should be made for the objects specified, as to the Senate might seem just:

Therefore, agreed that $600,000 be allowed the Cherokee people, "to include the expense of their removal and all claims of every nature and description against the government of the United States, not herein otherwise expressly provided for, and to be in lieu of the relinquished reservations and pre emptions, and the $300,000 for spoliations, mentioned in the first article of the treaty. This $600,000 to be applied and distributed according to the treaty, and any surplus remaining, after expenses of removal and payment of claims, to go to the education fund." * * [This merely referred to the Senate, and if approved, to be part of the treaty.]

ART. 4. The $100,000 mentioned in art. 12 (for the poor Cherokees) to go to the general fund, making it $500,000.

As the Senate committee well said, the provision—"the United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after arrival there"—imports pecuniary responsibility, an obligation to do this, over and above paying for their lands, rather than an agreement to disburse a trust fund

ıey might have added, that the stipulation to furnish them steam-ıats and baggage-wagons, physicians and medicines, conclusively .owed the same thing; as also the provisions for allowing $20, and ıying $33 33 *per capita*, to all who preferred to remove and subsist emselves. *This article was to be absolute, if the Senate decided for e Cherokees.*

It is obvious that the 15th article, in providing for deducting these :penses and expenditures from the $5,000,000, did so simply to pro-de for the case of a decision by the Senate that these were to come ıt of the $5,000,000, or rather that that sum was not the price of ıe lands alone, which was the true question. If they decided that it as, then none of these expenses were to be borne by the Cherokees—ıbsistence no more than removal.

And it is not an insignificant consideration, that all the neighboring ibes were removed and subsisted at the expense of the government. That was the case as to the Choctaws, (7 Stat. at Large, 336;) with ıe Creeks, (Id., 367;) and with the Seminoles, (Id., 369,) by treaties ade in 1832; and the United States had assumed the same obligation the Cherokees by the treaty of 1828.

The treaty is framed with a double aspect. It assumes that, although ıe $5,000,000 is, as the Cherokees contend, merely and solely the rice of their lands and possessions or claims east of the Mississippi, et the Cherokees are to remove and subsist themselves; and their spo-ation claims are to be satisfied out of the $5,000,000. The Chero-ees say that if the $5,000,000 is for their lands alone, then under the eaty of 1828, which that of 1835 declares is still in force, the United tates continue bound to remove and subsist them.

The treaty, I say, is first framed on the view of the President and ecretary of War. The 8th article provides that the United States ıall remove and subsist the Indians. The 15th article provides that ıe expenses of doing so shall be deducted from or paid out of the 5,000,000. These articles seem inconsistent. They are really not . If the Senate should decide (by allowing the $600,000) that the ,000,000 was the price of their lands alone, then it resulted, as a rollary from that decision, that the United States must remove and ıbsist them. That obligation could only exist as a consequence of ıat decision. To appropriate $600,000 was to acknowledge the whole bligation—to acknowledge it to its full extent.

The treaty is framed to provide for both contingencies. If the Sen-te decide that the $5,000,000 was for the lands only, then the 8th rticle stands unqualified by the 15th and reiterating the 8th article f the treaty of 1828. If they decide that the Indians were to remove nd subsist themselves, then the 15th article stands and qualifies the th.

Thus it is evident that the real question to be put was, not whether ıat sum covered this or that other thing, the claims, the expenses of moval, or the subsistence; but whether it was not simply the price of ıe lands and possessions, (which included improvements and ferries.) hat is, the Cherokees insisted on the letter of the award.

So it is agreed, that if the Senate decide according to the Cherokee nstruction, $600,000 shall be appropriated to pay the spoliation

claims, expenses of removal, the value of relinquished reservations and pre-emptions, and all claims against the government of every description. The year's subsistence is not specially mentioned.

The Senate had no power to decide any other question than the one submitted. Nothing in the treaty or supplement relinquishes any right under their award, or agrees to take anything in lieu of it.

Consequently, the decision of the Senate by allowing the $600,000 was, that the $5,000,000 was the price of the land alone.

Then appropriating $600,000 for, among other things, the spoliation claims and expenses of removal, (the former of which the United States was to pay, to the extent of $300,000, if the Senate decided for the Cherokees, and the latter of which they had agreed to bear,) did not relieve the United States from paying the whole expenses of removal, in case the $600,000 did not cover them as well as the claims, &c.

The United States were to remove and subsist the Cherokees, or pay them a certian sum each in case they did not. That agreement was positive. The 15th section, so far as it undertook to set-off the expenses of removal and subsistence against the $5,000,000, was as much objected to by the Cherokees, and liable to the same objection as the attempt to set-off the spoliation claims. The moment it was determined that the award meant what it said, then it was settled that the United States were bound to remove and subsist the Indians; and the part of the 15th article contrary to the Cherokee construction disappeared.

Did the Indians mean to take the $600,000 in lieu of the obligation of the United States to remove and subsist them, in lieu of the spoliation claims, and in lieu of the reservations and pre-emptions, and in full for all?

If they did, then the United States had nothing to do with removing them. If they chose to do so and to subsist them, and the expenses overran the $600,000, (after paying for the reservations and pre-emptions,) by what right could the United States take the excess out of the $5,000,000?

The Indians did not mean to take it in full. Their position was always, and always has been one and the same. It was "the 5,000,000 is the price of our lands, improvements, and ferries; you must pay us that, and in addition pay our claims for spoliations, and remove and subsist us, as you agreed to do by the treaty of 1828."

The Senate assents to the justice of this and says: "It is so, and therefore we appropriate $600,000 for those purposes." It was not enough. Who was to bear the excess of expense? Clearly the United States.

By the supplement, the Senate was to decide whether the $5,000,000 was meant to cover the spoliation claims and expenses of removal, and if not, then such further provision was to be made therefor as might appear to the Senate to be just; and by way of such provision for paying these claims, and removing and subsisting them, an appropriation of $600,000 was to be made.

It is merely the common case of too small an appropriation, made to pay an acknowleged claim. The Senate admits that the sum of

$5,000,000 did not cover the expenses of removal or the claims. That admits that those claims and expenses are to be paid by the government. It proceeds to make provision for them thus admitted. To do so it allows the Cherokees $600,000, to include (not to be in lieu or satisfaction of) these expenses and claims, but to be in lieu of the reservations and pre-emptions and the $300,000 mentioned in the treaty. It contemplates that a surplus will remain and provides how it shall go.

Suppose Congress appropriates $30,000 to pay salaries of judges of the Supreme Court, clerks, marshal, and contingent expenses, the surplus to go to a particular fund, would any one imagine that this was meant to be in lieu of these salaries and expenses?

The arbitrator could not go beyond nor fall short of the submission. The Senate was to decide whether the $5,000,000 was the price of the land alone, or whether it included expenses of removal and spoliations. Whichever way you put the question it comes to the same. If it did not include them it was because it was the price of the land alone. One was a mere corollary of the other. The award said nothing about those expenses and charges. The proposition is the award gives $5,000,000 for the land alone; *ergo*, it does no include payment of claims or expenses of removal, and for the same reason it does not include subsistence.

The moment the Senate decided that it did *not* include these, the United States became bound to remove and subsist the Indians, under the treaty of 1828, which remained in force. To respond to that obligation and liability, the $600,000 is allowed. It could not have been allowed, except as a *forced consequence* of the recognition of the obligation. It was asked *solely* on that ground, as such a consequence, not as a new favor or gratuity.

This was so clear—it was so clear that the $5,000,000 covered neither these claims for spoliations, nor expenses of removal, nor subsistence—that, on the 12th of June, 1838, Congress appropriated the sum of $1,047,067, in full for all objects specified in the eighth article of the treaty of 1835, and to aid in subsisting the Cherokees for one year, and provided that no part of this should be deducted from the $5,000,000.—(5 Stat. at Large, 242.)

This was a clear legislative declaration that the expenses of removal and subsistence *were* to be borne by the United States, and *could* not properly be paid out of, or deducted from, the $5,000,000.

The Secretary of War had decided that the government *ought* to bear *the expenses of removal.* He thought that General Scott *might* probably have doubted as to his power to agree to pay those expenses and the expense of *subsistence*, not that he would *certainly* have done so; and he submitted the question to Congress—clearly indicating his own opinion to be, that the intention of the treaty was that the United States should pay both. This was, by the act of 1838, clearly admitted to be the correct view of the case.

On the 25th of May, 1838, Mr. Poinsett, considering the United States bound to pay the *subsistence*, as well as expenses of removal, estimated, on the call of the House, as follows:

Balance necessary for expenses of removal.....	$435,900 00
Subsistence for 18,335 persons entitled, (including those who had already emigrated,) and at $33 33 a head....	611,105 55
	1,047,005 55

[H. Rep., 123, 1st sess. 33d Cong., p. 9.]

The estimate was accepted, and Congress concurred in Mr. Poinsett's conclusion, by appropriating as follows:—(Act June 12, 1838.)

They took the balance necessary for removal to be.....	$435,900 00
Subsistence for 18,335 Indians, at $33 33⅓ each	611,167 00
And appropriated this gross amount.....	1,047,067 00

They provided that this should *not* be paid out of the $5,000,000; and as if to show, still more conclusively, that the *full extent* of the obligation to remove and subsist the Indians was acknowledged, the act declares that the appropriation in full for *other* matters is only *in aid* of the *subsistence* of the Indians, the amount required for which was necessarily uncertain. What stronger recognition of *the whole* obligation, to its extremest extent, could there be?

The Senate committee, when the Senate was made arbitrator to settle the legal question whether the subsistence *was* properly payable out of the $5,000,000, say, (Rep. Com. Ind. Aff., Aug. 8, 1850,) that they think it should be borne by the United States.

They say that, by *a strict construction* of the treaty of 1835, it was a charge on the $5,000,000; but they state reasons for deciding *either way*.

The reasons they give *for* this view of the treaty are:

1st. That it was so understood by the government at the time, and that subsistence was enumerated, in the 15th article, among the expenditures to be offset against the $5,000,000. * * * * But it was not so understood by the Cherokees. The Senate's award of $5,000,000 "for their lands and possessions," was not so. And its inclusion in the 15th article was to bind the Cherokees only in case the Senate should hold that the $5,000,000 was *not* solely the price of the lands, improvements, and ferries. So much of the 15th article was conditional.

2d. The Secretary of War informed Ross, before the treaty was ratified, that nothing would be allowed for removal and subsistence. * * That was *his* construction. It was contrary to the award, and not the construction of the other contracting party. And the Senate and Congress have since reversed his decision.

3d. That the treaty generally specifies what *was* to be borne by the United States. * * * True; and the removal and subsistence were not so specified, because the parties disagreed as to them. Whether *they* were to be borne or not was left to the Senate.

4th. That the whole history of the *negotiation* shows that the $5,000,000 was all the United States were willing to pay for lands,

possessions, indemnity, removal, &c. * * * * The negotiations were professedly based on the award of the Senate. The President, Secretary, and Commissioner misunderstood that award. *They* were not the United States. What "the United States were willing to pay," is not to be learned from what *they* said, but from the award as interpreted by the Senate itself.

The agreement of the Senate to give $5,000,000 for the lands and possessions, shows the contrary, beyond any question.

The invariable policy of the government shows the contrary; and, as the committee well say, the expense of removal and subsistence are sacrifices which a simple remuneration for the price of homes does not compensate.

But the committee decide that the appropriation by the act of 1838 was a clear legislative affirmation of the terms offered by the Indians, and acceded to by the Secretary of War—a new consideration offered the Indians to induce them to abide by its terms.

We think it was more and different. It was a clear and distinct admission of the correctness of the Secretary's opinion, that, by the treaty itself, the United States was bound to bear all charges of removal and subsistence. It was an authoritative interpretation of the treaty, in accordance with the Cherokee construction.

So the Senate committee, in 1850, decided that the United States was bound to pay the subsistence.

They found that it had been charged against the $5,000,000 to the sum of.....	$800,528 31
Provided for by act of 1838, (as per estimate).....	611,105 55
Balance to be paid by the United States.....	189,422 76

Thus charging the United States with the whole subsistence.

The Senate adopted this report, and so decided that the United States was bound to pay the whole subsistence.

The act of Congress, (Sept. 30, 1850,) appropriated this amount, and declared that it had been improperly charged to the treaty fund.

The resolution of the Senate declared the same, and that the Cherokee nation was entitled to the balance.

Treaty of August 6, 1846, (9 *Stat. at Large*, 871,) *made with the Ross party, the treaty party, and the old settlers.*

ART. 3. Admits that the amounts allowed by the board of commissioners "for rents, under the name of improvements and spoliations, and for property of which the Indians were dispossessed under the sixteenth article of the treaty of 1835," and for reservations under the thirteenth article, were not justly chargeable against the $5,000,000; and agrees to refund them.

ART. 4. To ascertain the interest of the old settlers in the $5,600,000, agreed to be paid by the treaty of 1835, all investments and expenditures properly chargeable against that sum (as enumerated in article fifteen of that treaty) to be deducted, excluding all

extravagant and improper expenditures; and, as to the western Cherokees, the expenses of removal and subsistence, commuted at $53 33 each, to be charged against the $5,000,000.

ART. 9. The United States agree to make a fair and just settlement of all moneys due the Cherokees, to be divided *per capita* under the treaty of 1835; which settlement should embrace all sums paid for improvements, &c., spoliations, removal, subsistence, investments, &c.; deducting all which from the sum of $6,647,067—the balance to be paid *per capita* to all "entitled to receive the same under the treaty of 1835 and supplement of 1836, being all those then residing east."

ART. 10. "It is expressly agreed, that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees, now residing in States east of the Mississippi river, had or may have under the treaty of 1835, and the supplement thereto."

ART. 11. The Cherokees contending that the year's subsistence *was not chargeable against the* $5,000,000, it was submitted to the Senate to decide whether the United States or the Cherokees were to pay the subsistence; if the Cherokees, then whether it should be charged at more than $33 33 a head, and whether interest should be allowed on the amounts due the Cherokees.

Thus it was again submitted to the same body that had made the original award, giving the Cherokees $5,000,000 for their land and possessions, to determine whether, under that award and the treaty of 1835, the expenses of removal and subsistence of the Indians were properly chargeable against the $5,000,000. It was the same question submitted to them in 1836, and decided in favor of the Cherokees; the same submitted to both Houses of Congress in 1838, when, by appropriating every dollar estimated for such removal and subsistence of every Cherokee Indian living, they broadly acknowledged the legal obligation, to the entire and fullest extent. Again, the Senate was called on to say whether, under the treaty of 1835, the Indians were to remove and subsist themselves; in other words, whether the obligation on the United States to do so, created by the treaty of 1828, was abrogated by the treaty of 1835. How could it have been so abrogated, when the eighth article reiterates it; and when, by ratifying the treaty, the Senate decided that that of 1828 remained in full force, and that the Indians were to have five millions for their lands alone?

The Senate committee decided that, under the treaty of 1835 and the act of 1838, the expense of subsistence was not properly chargeable to the treaty fund. The Senate abopted this decision. The United States had elected this arbitrament. They were forever concluded by the decision, in favor of all parties interested. It was a decision as to the rights of the Indians under the Senate award made in 1835. It bound and concluded the United States. It forever estopped them to allege the contrary.

The act of Congress of 30th September, 1850, (9 St. at Large, 556,) appropriates the sum of $189,422 76, reported by the Senate committee, and adopted by the Senate, with interest, declaring it to be for expenses paid for subsistence, improperly charged to the treaty fund,

under the Senate award of 5th September, 1850, and eleventh article of treaty of 1846.

The Court thinks, that the fact that the United States agreed to pay $600,000 only, conclusively shows, that they intended thereby to limit the extent of their obligation.

That does not seem to me to follow. It was not proposed to submit to the Senate, whether its former award should be abrogated; but what it was. Upon their decision being made, the legal consequences resulted. If they decided that the $5,000,000 was not exclusively the price of the Cherokee lands and possessions, then the legal consequence followed, that the United States was to bear the expense of removal and subsistence, and pay the spoliation claims.

In case they should so decide, $600,000 was to be paid for these purposes. If that was not enough, the obligation to pay the residue still remained.

The United States could not be liable for even the $600,000, except as a consequence of the decision that they were liable for the whole. They were liable for *all* or *none*. The United States say, "We deny that we are liable for any part. If we are, however, we appropriate $600,000 to meet and comply with our obligation." The amount being found insufficient, the obligation remains. It never was agreed that the Cherokees should *partly* remove and subsist themselves. *You cannot* satisfy an *obligation* by merely making an insufficient appropriation, when, to do so, you first recognize the obligation.

The Court thinks that there was no concession that the Cherokee construction of the treaty was correct.

It seems to us that the United States have clearly conceded that:

1st. By agreeing to pay $600,000 in 1836 *towards* the expenses of removal and the spoliations.

2d. By agreeing to pay $1,047,067 for removal and subsistence, by act of 1838, after Mr. Poinsett's opinion that the United States were bound to pay the subsistence; and by providing that this should not be charged against the $5,000,000.

3d. By the decision of the Senate in 1850, on the very point of construction and law, when their committee holding that, under the treaty of 1835 and act of 1838, the United States were bound to pay the subsistence, and *therefore* still owed on that score alone $189,422 76; the Senate, first, by their *decision* and *judgment*, and Congress next, by law, expressly, and in so many words, declared that this *had been improperly charged to the treaty fund.*

The Court thinks, that on the face of the treaty of 1835 it is clear that the expenses of removal and subsistence, and the claims for spoliation, were to be borne by the treaty fund under article 15. * * We do not think so, when the facts and circumstances are all known. On the contrary, that article was framed to meet a contingency which did not occur—that of a decision by the Senate adverse to the Cherokees.

The Court says, that before this treaty was ratified, a question arose as to *its* construction, and caused the supplementary article. * * * No; the question was as to the construction of *the previous award* of the Senate.

The Court says, that the supplement of 1836 contains no concession

on the part of the United States that the Cherokee construction was correct. That the 2d article only states the fact that the supposition of the Cherokees *existed.* * * Of course. The question to be settled by the Senate was as to the meaning of the award prior to the treaty; and the treaty and supplement were framed to cover the contingency of a decision either way.

The Court says, that if it had been meant that the United States were to pay the whole expenses of removal and subsistence, there would have been an express stipulation to that effect. * * There *was* one as express as could be made, in the 8th article. The other articles to the contrary were to meet the contingency of the Senate holding otherwise. The real question submitted was, whether the $5,000,000 was for the land alone.

The Court, it seems to us, misapprehended the scope of the action of Mr. Poinsett, and of Congress in 1838. The former, it seems to us, gave it as his opinion, that the United States were *legally* bound to remove and subsist the Indians. Congress *did* concur with him in this opinion. They not only made "a simple appropriation" of the money for removal and subsistence, over a million dollars, but they expressly provided that it should *not* come out of the $5,000,000; and they declare that it is only *in aid* of the *subsistence* of the Cherokees. How could there be any stronger recognition of the obligation resting on the United States to remove and subsist the Cherokees!

The Court says that the decision of the Senate, in 1850, was, that "under the circumstances," the Cherokees were entitled to $189,422 76 for subsistence, and that this was "professedly not founded upon the construction of the treaty," but upon the *peculiar circumstances* connected with the transactions which had occurred between *the Ross party* and the United States. * * * We respectfully think the Court errs here. The Senate decided that this sum of $189,422 76, excess of one year's subsistance over $600 000, *was improperly charged* to the treaty fund by the accounting officers of the treasury. Under article 9 of the treaty of 1846, these officers, assigned to that duty by act of 7th August, 1848, were to show what moneys had been *properly expended* under the treaty of 1835, in order to determine what was the per capita payment under that treaty and the supplement of 1836.

The Senate therefore decided, *expressly*, that in making such settlement under *that* treaty, to see what was due under that treaty, no part of the expense of subsistence was properly charged against the Cherokees; but the United States, having paid $600,000 of it, was bound to pay the residue.

And this decision was not founded on what had occurred between the Ross party and the United States. The committee decided, that although, on the face of the treaty of 1835, by *strict* construction, the subsistence was to be paid out of the $5,000,000, against even which conclusion they stated strong reasons, the act of 1838 was *a clear legislative affirmance* of what was the original intention of the Senate and of the treaty of 1835. The committee say that the Secretary of War agreed to consider the expenses of removal and subsistence "as *intended* by the treaty of 1835, to be borne by the United States," and that Congress affirm his act, by providing that no part of the new

appropriation should be taken from the treaty fund; and they add, that the new appropriation for subsistence was "a discharge, *pro tanto*, of the obligation of the government to feed them," and not final satisfaction, as in case of removal.

Mr. Poinsett had said that the request of the Cherokees, that the expense of emigration should be borne by the United States, *ought to be granted*, and an application made for such *further* sum as might be required for that purpose; and he only proposed to make such further allowances as it was "believed were intended originally by the Senate."

The committee was mistaken in saying that this was *a new contract* made with the Ross party, or a new consideration to induce them to abide by the treaty. It was a concession that their construction was correct.

Whether it was or not, it bound the United States to remove all the Cherokees then unremoved, and to pay the subsistence of *all*, removed and unremoved, for one year. That was the meaning of the expression, "in full for all objects specified in the 8th article, and for the further object of *aiding* in the subsistence of the Indians." It was to be in full for the removal of all yet unremoved; it was to *aid* in subsisting *all*. It decided nothing as to *previous* expenses of removals, nor did it assume to. It did not say nor mean that the Cherokees *should* bear them, and the United States should *not*. But as to the subsistence, it made the United States responsible for *the whole*.

Accordingly the Senate determined, in 1850, that it was improper to charge *any part* of the subsistence against the $5,000,000.

They had previously determined the same thing as to removals and spoliations, when they appropriated $600,000 towards them. Nothing more remained to be settled.

If the United States assumed, as we think they did, to remove and subsist the Indians, then they must repay whatever they have taken out of, or retained of, the $5,000,000, to cover expenditures for those purposes. It was optional with the Indian to remove himself, or be removed; to subsist himself, or be subsisted. If he be removed and subsisted himself, the government owed him $53 33. If he did not, it was no concern of *his* how much it cost. Whatever it cost, the United States had no claim for it against him or the Cherokee people.

As to the committee, if the Court is correct in saying that they were appointed solely in the interest of the Cherokees, then the Cherokees should have been left to settle and fix their compensation. Nothing in the treaty authorizes the United States to do it, or to take the money of the Cherokees to pay them with. If they chose voluntarily to fix and pay them their compensation, to the large amount of $22.212 76, the presumption must be that it was for services rendered the United States, who were not appointed to audit the accounts of the committee against thier own nation, for services. There is no possible ground on which they can demand that the Cherokees shall repay what they thus paid without authority.

ALBERT PIKE,
Counsel for Petitioner.

To the honorable the Court of Claims:

The decision of the Court in the case of J. K. Rogers and others *vs.* the United States turned adversely on a point which was relied upon by the claimant as an admitted and settled one by Congress, viz: that by the supplementary articles of 1836 the United States was bound to defray the expenses of removal and spoliation; that if the sum of $600,000 named therein was not sufficient, the excess, if any, was not *properly* or *legally* deductable from the five million consideration as the price for the "*lands* and possessions" of the Cherokees; in proof of which the act of June 12, 1838, was cited as a qualified interpretation by Congress to that effect. But the Court has been pleased to rule otherwise, and decided, "to the extent of that sum" (viz: $600,000) "the United States became bound, but no further." But, continue the Court, "it may be said, and perhaps with justice, that this did not amount to a concession of right on either side. It was doubtless supposed that no further difficulty would arise. But, as regards the United States, the most that can be justly urged is, that, in view of the impressions of the Cherokees, they so far yielded to them as to agree to allow them the additional sum of six hundred thousand dollars. There can be no justice or propriety in saying that they either did or designed to do more. On the contrary, the very fact that they limited the sum conclusively shows that they intended thereby to limit the extent of their obligation."

This, as we understand it, is the main foundation on which the decision of the Court rests, and takes from us the act of June 12, 1838, on which we relied, as a fair and equitable interpretation by Congress of an implied, if not express, obligation of the United States to pay the expenses of removal and spoliations beyond the sum of $600,000, stipulated in the supplementary articles, should these two expenditures amount to more.

But as doubts were entertained at the time, and are still entertained on this point, which doubts "did not amount to a concession of right on either side, may we, without doing violence to the treaty, rightfully, as to a known and admitted fact that existed before and at the date of the treaty of 1835, inquire, what was the question again submitted to the Senate for their consideration and decision by the first article of that treaty and the supplement thereto? A very slight attention to the history of the negotiation will place this subject in its true light, and, if we are not very much mistaken, we think something more will be made to appear than the mere supposition of the Cherokee people, "that the sum of five millions of dollars mentioned in the first article of the treaty," "*was not intended to include the cost of removal, or the value of certain claims which many of their people had against the citizens of the United States;*" "but there is no concession on the part of the United States that the supposition of the Cherokee people was well founded." This, with all due deference to the Court, is a question of fact, and not of supposition, as stated in the supplement, and is susceptible of the clearest proof to the contrary. In order, then, to discover with certainty the intention of the makers of the treaty, may we with propriety go back to that history. Dwarris,

on Statutes, page 694, says: "In the exposition of a statute, the leading clue to the construction to be made is the intention of the legislature, and that may be derived from different signs. As a primary rule, it is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which moved the legislature to enact it. The same rule, we take it, is applicable to the construction of treaties."

In order, therefore, to ascertain and determine this fact, we go, first, to the original proposition submitted by the Cherokee delegation, February 25, 1835, to the Secretary of War, an extract of which is as follows:

"We propose, therefore, to meet the proposition of the President for an arrangement on the basis of a gross sum being paid to our nation for its title to all the lands lying within the charter limits of Georgia, North Carolina, Tennessee, and Alabama, leaving to the nation all the arrangements for indemnifying the individual rights of its own citizens for their removal and ultimate residence, on the following terms as the general basis, to wit: That the United States will stipulate to pay to the Cherokee nation east of the Mississippi, for a cession of its territory, the gross sum of twenty millions of dollars, and forthwith remove all the white settlers from that part of the territory lying within the charter limits of North Carolina, Tennessee, and Alabama, and to protect the Cherokees from the operation of the State laws, and the exercise of jurisdiction over them upon the Cherokee territory for five years, unless the Cherokees shall find it convenient, and will remove voluntarily previous to that time; and shall protect the Cherokee citizens from being turned off from their possessions and improvements within the limits of Georgia during said term of years, and to cause such as have been dispossessed under the laws of Georgia to be restored forthwith to possession."

"That the United States shall pay to the Cherokees for all losses sustained by them from the acts of the adjoining States and their citizens, in violation of the laws of the United States and treaties subsisting with the Cherokee nation, and an indemnity for all just claims arising out of the treaties of 1817 and 1819, for reservations of land of which they have been deprived contrary to provisions of those treaties, and secure to the Cherokee nation an indemnity for the contract stipulated with and secured by the treaty of 1819 to the Unicai Turnpike Company. And, also, secure to the Cherokee nation such annuities and school funds as have been stipulated and provided for in former treaties, by investment of the same in some profitable stock, to the credit and interest of the nation."—(Doc. No. 286, Ho. of Reps. 24th Congress, 1st session, pages 127 and 128.)

This was a proposition for a cession of the Cherokee territory for the gross sum of twenty millions of dollars, and payment additional for all losses from acts of the adjoining States and their citizens, and compensation for reservations of land arising out of the treaties of 1817 and 1819, &c. The determination of the Cherokees, as the latter part of these proposals show, was to remove beyond the limits and jurisdiction of the United States, and to purchase a territory for their future residence from the government of Mexico. The fact is well

known to the Cherokeee people, and is regarded by them as part of their history. The terms of cession, however, were considered too extravagant by the President, and on February 27, 1835, the delegation addressed the Secretary of War the following note:

"Having been informed by Wm. H. Underwood, esq., and others, that the President considers the terms of our propositions to be too extravagant, we beg leave to remind him that he has often remarked that he would grant us as liberal terms as the Senate or the friends of the Indians would be willing to allow. We would, therefore, respectfully ask that our propositions be submitted to the Senate by the President, in order that the sense of the honorable body may be had on them."—(Same doc., page 129.)

The request contained in this note to submit the "propositions" of the delegation to the Senate, was not a new or strange one to the President, as he had often remarked to the delegation before, "that he would grant (the Cherokees) as liberal terms as the Senate or the friends of the Indian would be willing to allow." This latter proposition of the delegation was acceded to by the President, upon one condition and that was, that the delegation would give a written pledge to abide the award of the Senate. This pledge was finally given by the delegation in a note addressed to the Secretary of War of February 28, 1835, to the following purport:

"Having submitted a proposition for a final adjustment of our difficulties with the government of the United States, and understanding that the President deems it to be too extravagant, we must beg that the subject be referred to the Senate for its sense on the question; the President having often told us that he was disposed to treat us with liberal justice, and that he would go as far as the Senate would allow him in regard to money matters."

"We, therefore, trust that he will adopt this course. Being extremely desirous that this unhappy controversy might be speedily adjusted, and deeply sensible of our dependent condition, and confiding in the liberal justice of the United States government, we are prepared, so far as *we* are concerned, to abi e the award of the sense of the American Senate upon our proposition, and to recommend the same for the final determination of our nation."—(Ibid, page 141.)

Thus, the "propositions" of the delegation as contained in their letter to the Secretary of War of February 25, 1835, being about to be submitted by the President to the Senate for their decision as umpire, and both parties agreeing to abide the award of the Senate, the delegation thought proper to memorialize the Senate on that behalf, which they did March 3, 1835, an extract of which is here inserted:

"The undersigned, delegates of the Cherokee nation, beg leave to represent to your honorable body that, since the presentation of the memorial of their nation through them, on the 19th day of January last, certain propositions have been made by them to the Executive, as a basis by which they were willing to enter into an arrangement, subject to the ratification of their nation, for a final termination of their difficulties in relation to their affairs. And upon being informed that those propositions did not receive the assent of the President, the delegation then respectfully requested him, through the War Department,

to submit the same before your honorable body, in order that the sense of the Senate might be had on them, inasmuch as he had often remarked to the delegation, that he was disposed to treat their nation with liberal justice, and that he would go as far as your honorable body would allow him in in money matters. On the morning of the 28th ultimo, the delegation, in compliance with a special verbal message from the honorable Secretary of War, waited on him in his office; and at that interview the honorable Secretary urged upon them the necessity of their stating in writing to the department, before their propositions could be submitted by the President, that so far as they were concerned, they would abide the award of the American Senate upon their propositions, and that they would recommend the same for the final determination of their nation. The honorable Secretary then left the delegation in his office to make up their minds on the subject, until he would return from a visit to the executive department; and upon his return, the delegation had a letter prepared to meet his request, and after placing it into his hands, he assured the delegation that their propositions would be cheerfully submitted, and that the President had expressed himself to be still disposed to 'go as far as the Senate.' Upon these distinct assurances and understanding, the delegation took leave of the honorable Secretary."—(Ibid, page 125.)

This extract is a confirmation of all that has heretofore been stated with regard to the fact of the submission by the President of the "propositions" of the Cherokee delegation to the arbitrament of the Senate. If any doubts, however, existed on this point, those doubts were put at rest by the following extract of a letter to the Secretary of War, bearing date March 6, 1835, and addressed to the delegation, in which he formally communicates to them the decision of the Senate. This decision was in the form of a resolution, and the words in which it is written admit of but one construction.

"GENTLEMEN: In your letter of the 28th ultimo, you stated your readiness to accept for yourselves, and to recommend to the Cherokee kee people to accept such a sum for their claims east of the Mississippi river asthe Senate of the United States might deem just. The Senate have, by a resolution, stated as their opinion, that "*a sum not exceeding five millions of dollars should be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river.*"

"The President wishes now, as he has always done heretofore, to treat with you in a spirit of candor as well as liberality. He has therefore directed me to communicate to you at once the resolution of the Senate, and to state his willingness to enter into a negotiation with you for the cession of all your *claims* east of the Mississippi, upon condition that the whole amount of the consideration to be given shall not exceed the above mentioned sum. This you were before informed should be done, and the pledge will be redeemed with fidelity."—(Ibid, pages 142, 143.)

On the same day (March 6) the delegation responded as follows:

"Your letter of this date is received, and we regret that you did not submit for our information the whole proceedings of the Senate in relation to the propositions which we had the honor of presenting for the consideration of the President, and which, upon placing into your

hands our letter of the 28th ultimo, we were distinctly informed by you would be cheerfully submitted. To a full and clear understanding of the entire action of the Senate on our case, we claim it as a matter of justice to our nation, that the same should be laid before us; we must, therefore, respectfully ask the favor of you to have a full transcript of the same made out and sent to us. We would also beg leave to inquire whether we are to understand from your communication of this date, that the five millions of dollars resolved by the Senate "should be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river, as embracing also the expenses for transportation and subsistence in removal, and for subsistence for twelve months after their arrival at their new homes; for blankets, guns, &c., or whether that sum is an offer, as really appears from the resolution to be, only for the extinguishment of the Cherokee title to the lands east of the Mississippi river, and for the houses and improvements of the Cherokee inhabitants situated thereon; and that the United States will, in addition, pay for the expense of transportation and subsistence in their removal, &c., the same as have been provided for the general plan for Cherokee removals, which have been adopted from the provisions of the treaty of the 6th of May, 1828, between the United States and that portion of the Cherokees residing west of the Mississippi river; and, also, whether an additional extent of territory will be added to the one already laid off for the Cherokees west of that river, and of what extent. It is indispensably necessary to candor and justice that all these points should be clearly understood on both sides; and it is utterly impossible for us to proceed further until we do understand them."—(*Ibid*, pages 143–'4.)

The delegation, it must be admitted, were in justice and good faith as much entitled to the benefit of the decision of the umpire as the Secretary of War or the President of the United States, and should have been furnished, as requested, with "a full transcript of the proceedings of the Senate" on which the award or resolution was adopted. This was not only due to them, to a full understanding "of the *entire* action of the Senate" on their case, but also as a matter of justice to their nation, that the same should have been laid before them. That this was not done is no fault of theirs, as will appear from the following extract of a letter of the Secretary of War, addressed to them March 7, 1835:

"GENTLEMEN: I have just received your letter of this date. The sum of five millions dollars, which is offered for your claims east of the Mississippi, will, as I have already informed you, be in full for your entire cession. The application of it will be such as you desire, a just regard being had to individual rights. Nothing more will be paid for removal or for any other purpose or object whatever. In giving to you the full value of your property, the United States comply with all the demands of justice upon them."

"This letter closes the intercourse in writing between us."—(Ibid, page 145.)

The statement contained in the above letter, and the refusal to furnish the delegation with a transcript of the proceedings of the Senate in their case, together with the threat verbally made by the Secretary

of War to negotiate with another and unauthorized delegation then present in the city, as indicated in the protest contained in the latter part of the last letter of the delegation to the Secretary of March 9, 1835, broke off the negotiation in these words:

"And if the department persist in the unexpected and most extraordinary course which you intimated to us this morning was about to be adopted, that is, of entering into a treaty with John Ridge and others, unauthorized individuals who are here, for an entire cession of the Cherokee lands, &c., east of the Mississippi river, and providing for the application of the money proposed to be given for the same, the great object, so earnestly pressed on both sides, for reconciliating and restoring harmony and good feeling of all, and thereby terminating the Cherokee difficulties satisfactorily, will most assuredly be defeated by your own acts. And, as the duly authorized delegation of the Cherokee nation here, we do most solemnly protest against any such arrangements being entered into with those individuals. In your letter of the 7th instant, closing all further intercourse in writing between us, you distinctly informed us that the application of the $5,000,000 which is offered for our lands and possessions east of the Mississippi river will be such as we desire—a just regard being had to individual rights. Well, then, if the nation will consent to treat and accept of the sum offered, let its own wishes in regard to the application be consulted and adopted—a just regard being had to individual rights. And on the part of the delegation here, we again repeat that *we* are prepared to comply in good faith with every promise which we have made to the department on the subject, provided you do the same on your part, and will not throw any obstacles in our way."—(Ibid, pages 145-'6.)

It is to be regretted, even at this late period, that the delegation was not furnished with a full transcript of the action of the Senate in their case by the Secretary of War, as requested by them. This request, no doubt, would have been complied with by the Secretary had the injunction been removed by the Senate from their proceedings in that case. Then there could have been no just cause on their part for refusing to enter into a treaty at that time, by which all doubts would have been removed as to the true interpretation of the two terms used in the resolution of the Senate—"*lands* and *possessions*"—to say nothing of the money that would have been saved to the United States, and the many, very many, evil and devastating consequences resulting from it to the Cherokee people. But the injunction was not removed, and has not been, as we are informed, up to the present day. Therefore, we are left to infer that the Senate intended to do just what their resolution says, viz: that "a sum not exceeding five millions of dollars should be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river."

The resolution, as reported by the Secretary of War in his letter of March 6, 1835, to the delegation, and as inserted in the 1st article of the treaty of 1835, is a correct transcript or copy as we are told, by those who are in a position most likely to know, is all that the journal shows of the proceedings of the Senate on its adoption.

If, therefore, the fact be true as stated, there can be no doubt as to

the legal interpretation of the words used in the resolution; and it strikes us that the Secretary of War was wrong in the construction which he placed upon them. Five millions of dollars was the ultimatum authorized to be given by the Senate. For what purpose, we would ask, was that sum of money to be given? The answer is found in the resolution itself, viz: "for all the *lands* and *possessions* of the Cherokee Indians east of the Mississippi river." In the absence, then, of all proof to the contrary, the delegation had the right, as we now have, to insist upon the legal interpretation of those terms. Bouvier, in his Law Dictionary, says of land: "This term comprehends any ground, soil or earth whatsoever, as meadows, pastures, woods, waters, marshes, furze and heath. It has an indefinite extent upwards as well as downwards; therefore land legally includes all houses and other buildings standing or built on it, and whatever is in a direct line between the surface and the centre of the earth," &c. The meaning of both terms are expressed in one, and as "*lands* and *possessions*" go together, and land being a common law term, Dawris on Statutes, page 694, says: "If a statute make use of a word, the meaning of which is well known, and has a certain definite sense at the common law, the word shall be expounded and received in the sense in which it is understood at the common law."

The Senate having use in their award the terms "*lands* and *possessions*," and having left no clue or record evidence to show that they intended to convey any other meaning than the terms signify, we claim the benefit of their legal interpretation to the very letter. Does "*lands*" signify "*removal and spoliations*," or does "*possessions*" include "*subsistence?*" Certainly not. Then we contend that the implication of the Secretary of War to the contrary, was wholly untenable and inadmissable, and, therefore, his instructions to the commissioners who finally negotiated the treaty of New Echota was given upon a mistaken supposition, as we shall be able to show by unquestionable proof.

It is proper here to state, that notwithstanding the letter of the delegation of March 9, 1835, to the Secretary of War, protesting against his negotiating with John Ridge and others then present, that protest was disregarded, and a treaty concluded with them on the 14th day of March, 1835, and sent out to the nation for ratification. Accompanying the treaty was an address or talk to the Cherokee people from General Jackson himself, in which he says:

"The whole subject has been taken into consideration, and an arrangement has been made which ought to be, and I trust will be, entirely satisfactory to you. The Senate of the United States have given their opinion of the value of your *possessions*, and this value is insured to you in the arrangement which has been prepared. Mr. John Ross, and the party who were with him, expressed their determination to accept, as far as they were concerned, such a sum as the Senate might consider just, and promised to recommend and support the same in your general council. The stipulations contained in this instrument are designed to afford due protection to private rights, to make adequate provision for the poorer class of your people, to provide for the removal of all, and to lay the foundation of such social and

political establishments in your new country as will render you a happy and prosperous people. Why, then, should any honest man among you object to removal? The United States have assigned to you a fertile and extensive country, with a very fine climate adapted to your habits, and with all the other natural advantages which you ought to desire or expect."

"I shall, in the course of a short time, appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views, and the nature of the stipulations which are offered to you."

"These stipulations provide—

"1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you."

"2d. For the payment of the full value to each individual of his possession in Georgia, Alabama, North Carolina, and Tennessee."

"3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person."—(Doc. 286, pages 43, 44, 24th Congress, 1st session, House of Representatives.)

Now, General Jackson either designed to do what he said he would do, or he intended to practice a fraud. We know he is dead, but his language lives, and who is bold enough at the present day to say that he designed or intended the latter, where he promised the former? No one, we presume, would pretend to say so, and his words were stated just as they appear, by his commissioners through their interpreter, to the Cherokee people assembled, and they so understood them. That the Senate intended to give the *five millions of dollars* named in their resolution, for the "*lands* and *possessions*" of the Cherokees, there can be but little doubt. The fact will be made apparent by a letter addressed to the President, by three senators who voted for the resolution in executive session. This letter we shall have occasion to notice more particularly when we come to consider the supplementary articles of the treaty.

In compliance with the promise of the President to appoint commissioners for the purpose of meeting the "*whole body*" of the Cherokee people "*in council*," said commissioners were appointed, as the following letter of instruction from the Secretary of War, dated, April 2, 1835, and addressed to Rev. John F. Schermerhorn, Utica, New York, and Gov. William Carroll, Nashville, Tennessee, will show:

"GENTLEMEN: I have the honor to inform you that the President has appointed you commissioners to negotiate with the Cherokee Indians east of the Mississippi river.

A copy of the arrangement recently made between some individuals of the Cherokee tribe and Mr. Schermerhorn is herewith enclosed, together with copies of certain other papers, which may be useful to you in the performance of your duties. I enclose also the address of the President of the Cherokee people, which you will cause to be read

to them in open council, and enforce by such topics as may occur to you.

You are aware of the importance of removing these Indians, and are acquainted generally with the history of our intercourse with them, and of the efforts which have been made for the termination of the difficulties in which they have been placed. I need not, therefore, enlarge upon these subjects.

The provisional treaty contains the general terms which the President is disposed to offer to the Indians, and he is desirous that the Cherokee people should assent to this arrangement without making any change in its stipulations. Still, however, he would not object to such alterations as might be deemed essential by them, and which would not conflict with those principles which he deems indispensable to a proper settlement of this difficult and protracted affair. I shall proceed to state to you those conditions, from which the President will not depart. Within these limits, if it will tend to conciliate the Indians, and to insure their assent to a treaty, you are authorized to make such changes as you may deem proper and as they may demand.

The Senate have, by resolution, stated it as their opinion, "that a sum not exceeding five millions of dollars ($5,000,000) might probably be allowed to these Indians for the cession of their entire claims east of the Mississippi river."

With all due deference to the Secretary of War, we beg to say there are no such words as "*probable*" and "*claims*" in the resolution of the Senate, and we have italicized them to indicate the fact. The resolution as communicated by the Secretary of War, in his letter of March 6, 1835, to the Cherokee delegation, and as inserted in the 1st article of the treaty of 1835, is in these words, viz: "That a sum not exceeding five millions of dollars shall be paid to the Cherokee Indians for all their 'lands and possessions' east of the Missisippi river." How "lands" and "possessions" can be construed or even tortured to mean "might probably be allowed to these Indians for the cession of their entire claims east," we leave it for the Secretary of War and those who agree with him to show. We know of no rule, either legal or arbitrary, that will admit of such construction. The President, in his talk to the Cherokees, in speaking of the resolution of the Senate, says: "The Senate of the United States have given their opinion of the value of your possessions;" thus showing that he understood the resolution of the Senate differently; and the original proposition of the Cherokee delegation of February 25, 1835, on which the action of the Senate was predicated, does not warrant or justify such an interpretation. How, then, is the remainder of the Secretary's instructions to be justified? He says:

"Prior to the adoption of this resolution, Mr. John Ross and his party, who were then in this city, avowed their determination to abide by the decision of the Senate on this point, and to accept such a consideration as that body might deem reasonable. After the Senate, however, had acted upon the matter, that party declined acquiescence, and would not enter into an arrangement, as they had before promised to do. Among the papers enclosed to you, you will find those neces-

sary to a full knowledge of this affair. You will, therefore, under no circumstances increase the amount of the consideration to be given. If, however, the Indians should prefer to receive the whole amount, viz: five millions of dollars, in lieu of the sum of four millions five hundred thousand dollars, and of the additional tract west of the Mississippi, estimated at eight hundred thousand acres, you are at liberty to give them the whole sum in money, and to withhold this additional tract."

We have already shown the difference in phraseology and meaning of the resolution actually passed by the Senate, and the terms used by the Secretary of War, in his instructions to the commissioners, purporting to give the meaning of that resolution. The terms "*lands*" and "*possessions*," as remarked, will not admit of the construction attempted to be put upon them by the Secretary, without doing violence to their plain common sense meaning, to say nothing of their legal signification. Neither will the original proposition of the delegation authorize such a construction. The proposal was for a cession of the Cherokee territory east of the Mississippi river, for the gross sum of twenty millions of dollars; leaving to the nation all the arrangements for indemnifying the individual rights of its own citizens, for their removal and ultimate residence, &c.; and, in addition to this, that the United States should pay the Cherokees for all losses sustained by them from the acts of the adjoining States and their citizens, in violation of the laws of the United States and treaties subsisting with the Cherokee nation, and all just claims arising out of the treaties of 1817 and 1819 for reservations of land, &c. This was the substance of the proposals submitted by the delegation to the Secretary, and declined by the President, on account of their extravagance, but which, upon agreement, was finally submitted by the President for the arbitrament of the Senate—the delegation agreeing to abide the award of the Senate on their proposition, and to recommend the same for the final determination of their "nation." The decision of the Senate fell far short of twenty millions of dollars, and authorized *only* the payment of one-third of that sum to the Cherokee nation. When the result of the decision of the Senate was communicated to the delegation by the Secretary of War, they did not decline acquiescence, as stated by him in his instructions to the commissioners, but simply stated that "to a full and clear understanding of the entire action of the Senate on their case, they claimed it as a matter of justice to their nation that the same should be laid before them, and respectfully asked the favor of having a full transcript of the same made out and sent to them." They also further requested to be informed whether the five millions resolved by the Senate "should be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river," "as embracing also the expenses for transportation and subsistence in removal, and for subsistence for twelve months after their arrival at their new homes, for blankets, guns, &c; or whether that sum is an offer, *as really appears from the resolution to be, only for the extinguishment of the Cherokee title to the lands east of the Mississippi, and for the houses and improvements of the Cherokee inhabitants situated thereon?*"

To this the Secretary responded: "The sum of $5,000,000 will, as I have already informed you, be in full for your entire cession. Nothing more will be paid for removal or for any other purpose or object whatever. This letter closes the intercourse in writing between us." We need not recapitulate what we have heretofore stated as the result of this correspondence.

The main question to be considered now is, which of the parties were correct in their interpretation of the sense and meaning of the resolution of the Senate? In order to determine and settle the question fairly, we must go to the propositions of the commissioners made to the Cherokee people in council, their rejection of them, and the final negotiation of the treaty of New Echota, of 1835, by a minority of the people.

On the 17th day of October, 1835, the commissioner on the part of the United States addressed proposals of a treaty "*to the chiefs, headmen, and warriors of the Cherokee Indians in general council assembled,*" from which we make one or two extracts:

"The commissioner has also to observe, for the information of the general council, that the Cherokee delegation who visited Washington last winter, consisting of Messrs. John Ross, R. Taylor, Wm. Rogers, Daniel McCoy, and Samuel Gunter, who were authorized by a full power of attorney, as your agents, to settle all your difficulties with the United States, and enter into a treaty for the cession of your whole country, did agree to sell the same to the United States for such a sum as the Senate of the United States should *award.* The Senate fixed the price at five millions; and when the President called upon them, through the Secretary of War, to submit propositions as to the manner in which they wished this amount paid and disposed of, for the purpose of embracing the same in a treaty, they declined, *and proposed that this matter should be referred to the Cherokee nation in general council to deliberate and determine on the subject, in order to produce harmony and good feeling among themselves, and to prevent any unjust imputations or prejudices against themselves or others.*

"Should there be any important points of difference between the Cherokees and commissioners in regard to the *award of the Senate,* they can be included in a separate and conditional article, *by which they will again be brought before the President and Senate for their final determination.*

"The commissioners, therefore, wish to know distinctly whether the people of the Cherokee nation, at this general council, will enter into negotiations for a treaty on the basis of the five millions of dollars awarded by the Senate, and which your delegation, duly authorized with a full power of attorney, agree for *themselves to accept, and urge upon their people to close their difficulties with the United States by a treaty, or whether they are determined to do nothing on the subject.*" —(Ibid., pages 65, 66, 67.)

The answer of the Cherokee people to the above is as follows:

"We, the people of the Cherokee nation, in general council assembled, *do hereby solemnly protest against selling our country on the basis of the five millions of dollars, and will never sanction any such treaty.* We approve of and confirm the nomination and appointment

of John Ross, principal chief," and others named, "as our representatives to the United States government; also, of the powers in them vested under the resolutions of the general council annexed; and we unite with the committee and council in forbidding any delegation to treat with the general government of the United States of North America, excepting the delegation now formally and openly confirmed by us, the people of the Cherokee nation.

"Given under our hands at the national council ground, at Red Clay, this 24th day of October, 1835."—(Ibid., page 80.)

On the 27th October, 1835, Mr. Ross informs the commissioner:

"SIR: By a resolution passed yesterday, (October 26,) I am instructed by the national committee and council, in general council convened, to acquaint you that twenty citizens of this nation, nominated by the people in open assembly, and by them publicly appointed as a delegation, fully empowered to treat finally with the general government of the United States, here or at Washington city, are now ready to meet any commissioner upon the subject who can produce adequate credentials. If, therefore, you desire to communicate in relation to this matter, I, as one of the delegation thus appointed, am prepared to give notice of any interview for that purpose between you, my associates, and myself, in the committee room, at any hour which may best suit your convenience."

On the same day, (October 27,) the commissioner responded:

"GENTLEMEN: In answer to your communication of this morning, I assure you I will meet you, with much pleasure, at your committee room, at 3 o'clock p. m. to-day, as the commissioner on the part of the United State to treat with the Cherokees east."

From the proposals of the commissioner submitted to the delegation at this interview, it is only necessary for our purpose to make but a single extract:

"But whereas a question has arisen between the commissioner and the agents of the Cherokee nation, whether the Senate of the United States intended to include in the award also the *just claims* of the Cherokee people against the United States, *or the price of the land only*, it is therefore agreed *that that matter shall be again referred to the Senate for their determination;* and in case *the claims were not intended to be included*, then, in addition to the five millions, there shall be allowed ——— dollars for claims; but if the Senate shall not allow this additional amount, it shall not invalidate this treaty."—(Ibid., pages 87 and 88.)

From the reply of the delegation of the 28th of October, 1835, to the proposals of the commissioner, a single extract will suffice: "But, upon examining the articles you have submitted to them as the basis of the treaty you have to propose, they can find in them no real variation from those against which the Cherokee nation have already openly and formally protested. It is true you offer to insert an additional clause, allowing a consideration for 'the just claims of the Cherokee people.' But this is only conditional. You make it dependent upon the approval of the Senate, who may disapprove, and who, indeed, by the explanation we have ourselves received in writing rom the Secretary of War, are sure to disapprove. And you state

that neither yourself, nor even the President, can pledge yourselves for this or any other change, without the sanction of the Senate."—(Ibid., pages 90, 91.)

On the 29th October the commissioner replied: "GENTLEMEN: I have just received your communication of yesterday, and it will require some time to answer it, which I shall do with pleasure. I have only now to request your delegation to meet me at your committee room to-morrow morning at 1 o'clock a. m."

On the same day, (October 29,) the delegation replied, through John Ross, to the commissioner: "SIR: The delegation have made arrangements to depart, in order to prepare for their journey to Washington; but it will give me great pleasure to meet you to-morrow at the hour you desire."—(Ibid., page 92.)

At this interview the commissioner was more specific in his proposals, without, however, enlarging the basis of negotiation, and again renews the provisional proposition: "But whereas a question has arisen between the commissioner and the agents of the Cherokee nation whether the Senate of the United States intended to include in the award also the just claims of the Cherokee people against the United States, or the price of the land only, it is therefore agreed that that matter shall again be referred to the Senate for their determination; and in case the claims were not intended to be included, then, in addition to the $5,000,000, there shall be allowed ——— for claims; but if the Senate shall not allow this additional amount, it shall not invalidate this treaty."—(Ibid., page 94.)

On the 30th of the same month, the commissioner informs Mr. Ross that "the commissioners are instructed to convene a council at New Echota at such time as they think best, and Governor Carroll has requested and authorized me to call said council when I deem most expedient. You are therefore hereby notified that the commissioners will meet the Cherokee people in general council on the third Monday in December next; and you are requested to assemble the people accordingly for the purpose of negotiating and concluding a treaty with the United States."—(Ibid., page 93.)

To the above, the delegation replied on the 31st of October, 1835:

"SIR: Neither your last communication in writing, nor that which you did us the honor to accompany it in person, appear to disclose any views materially different in fact from those upon which we have already decided, although there may be some difference in form. We are, therefore, compelled once more to assure you that our former answer must be considered as final, and our arrangements requiring despatch, we have closed our meeting as a delegation, and shall do no further business until we arrive at Washington."—(Ibid., pp. 99, 100.)

Thus terminated the negotiation between the commissioner and the legally constituted authorities of the nation; and the only alternative left to the Cherokee people to save themselves from expulsion at the point of the bayonet by the States was to meet the commissioners at New Echota at the time designated, and make the best and only treaty that could be obtained from them under the circumstances. Consequently, a minority, and a bare minority, met the commissioners at that place, and finally negotiated the memorable treaty of the 29th of

December, 1835. By reference to the journal of the council, it will be seen that the treaty was not to be submitted to the Senate until after the fact was fully ascertained with regard to the payment of claims, as the following extract will show:

"DECEMBER 28, 1835.—The council assembled at the council house, and, in the absence of Mr. Gunter, appointed Johnson Rogers chairman.

"The committee reported that they had carefully examined the propositions for a treaty, and conferred with the commissioner on some points of difference as to spoliation claims, pre-emption rights, and reservations under former treaties. And it was agreed by the commissioner that there should be a certainty on the subject of claims before the treaty was submitted to the Senate. And, also, that a committee should be appointed of the Cherokee people to recommend suitable persons for pre-emption privileges, and to transact and settle all the business of the nation under this treaty with the United States."—(Doc. No. 286, p. 113.)

The treaty was formally signed on the 29th, the first article containing a provision that the question of claims should be again submitted to the Senate for their consideration and decision. In order, therefore, to ascertain with certainty the question that was again to be submitted to the Senate, it became necessary to show not only how the matter of arbitrament was first brought before the Senate, but also to give the contemporaneous history of the negotiation of the treaty, based as it was on the resolution or award of the Senate. This duty has been carefully and faithfully performed, and there can be, it seems to us, but little difference of opinion, if any, as to what the question was that was again to be submitted to the Senate. The original propositions of the delegation that were before the Senate when the resolution was adopted; the language of the resolution itself; the address of Gen. Jackson to the Cherokee people, and provisional articles inserted in the proposals of the commissioners to treat, to say nothing at present of the agreement contained in the journal of the council who negotiated the treaty;—all goes to prove with unerring certainty the question that was again submitted to the Senate.

Having stated that the resolution as reported by the Secretary of War, in his letter of March 6, 1835, to the Cherokee delegation, and as inserted in the 1st article of the treaty, is a correct transcript or copy, and the Senate having left no clue or record evidence to show that they intended to convey any other meaning than the terms of the resolution signify, we shall claim the full benefit of their legal interpretation: this we now do to the very letter, upon the ground that the resolution is the decision of the Senate on the question of arbitrament; and said resolution being inserted in the treaty, necessarily becomes part and parcel of it, if not the very treaty itself, and both parties are bound by its terms.

The agreement of the commissioner (as the journal of the council shows) was, that there should first "be a certainty on the subject of claims before the treaty was submitted to the Senate" for ratification. How was that "*certainty*" to be ascertained? The injunction had not been removed from the proceedings of the Senate, and it being

impossible for the treaty to be submitted until the fact was known, it was finally suggested that a statement from some of the senators who voted for the resolution in executive session would be quite as binding on the parties as if the question were again referred, and formally decided by the Senate. The suggestion was acquiesced in; consequently, on the 29th day of February, 1835, three of the senators who voted for the resolution, viz: Messrs. Cuthbert and King, of Georgia, and Mr. King, of Alabama, addressed the President the following note:

"*To the President of the United States*:

"We have no hesitation in stating it to be our impression, sir, that the Senate of the United States did not intend that the allowance for spoliations or the expenses of removal should be deducted from the amount of five millions recommended to be offered to the Cherokees as the price of their territory. It is also our confident opinion that the Senate will readily add six hundred thousand dollars to the sum of five millions to meet these two expenditures.

"With the greatest respect,

"A. CUTHBERT.
"JOHN P. KING.
"WILLIAM R. KING.

"FEBRUARY 29, 1836."

This letter and the instructions of the Secretary of War to the commissioners were obtained from the executive clerk of the Senate, copies of which are herewith submitted.

The opinion thus expressed and adopted was clearly in favor of the construction insisted upon by the Cherokees, and against that attempted to be enforced by the Secretary of War and those acting under him, and settled all doubts as to what was the true interpretation of the terms used in the resolution—"lands and possessions"—in favor of the Indians. The question being thus definitely settled, the supplementary articles were added, not upon the principle, as stated in the 2d article, "whereas the Cherokee people have supposed that the sum of $5,000,000," for that question was no longer a supposable one; but was a settled and fixed fact in favor of the Cherokees, "that the Senate of the United States did not intend that the allowance for spoliations or the expenses of removal should be *deducted* from the amount of $5,000,000 recommended to be offered to the Cherokees as the *price of their territory*." The $5,000,000, then, being intended by the Senate "*as the price of the Cherokee territory*" *only*, the Secretary of War and those under him, as we have before remarked, were not only wrong in attempting to force a construction repugnant to the legal interpretation of the words in the resolution, but the commissioner was also guilty of perpetrating a gross fraud upon the subsequent opinion of those senators as expressed to the President, by imposing on the Cherokees the supplementary articles as they now stand for that opinion; for we unhesitatingly state *now* and *forever*, that their letter was never exhibited to the Cherokees by the commissioner, and they never saw it until years afterwards, in

the printed documents of the Senate. If they had seen it previously to entering into the supplement, one article instead of three would have been quite sufficient to cover what those senators state in the conclusion of that letter, viz: "It is also our confident opinion that the Senate will readily add six hundred thousand dollars to the sum of five millions *to meet these two expenditures.*" That this letter was before the Senate at the time they ratified the treaty and supplement, is apparent from the fact of its being found among the printed documents of that body. How does its language correspond with that used in the 3d article of the supplement? By placing the two in juxtaposition, there can be no difficulty in discovering a wilful misrepresentation on the part of the commissioner, by lugging into said article objects foreign to the letter. Why add, "and all claims of *every nature* and *description* against the government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions," when he must have known the $600,000 was intended to meet two expenditures *only*, viz: spoliations and the expenses of removal?

Is it not clear, therefore, if $600,000 was not sufficient to cover spoliations and the expenses of removal, the excess, if any, could not be "*deducted*" from the five millions authorized by the resolution of the Senate to be given to the Cherokees as "*the price of their territory?*" It was, it is true, an addition to that sum, but the addition did not release the responsibility of the United States to pay more, if the two objects to be accomplished by it amounted to more than $600,000, inasmuch as the Senate did not intend that that expenditure should be deducted from the five millions at all. Such, evidently, was the opinion of the senators to whom the question was submitted, and their opinions not being questioned or denied by the Senate afterwards, we are, upon every principle of justice and good conscience, entitled to the full benefit of it, as a settlement of the contested question by the Senate in favor of the Cherokees.

Having thus shown, by the contemporaneous history of the negotiation of the treaty of 1835, what question was again to be submitted to the Senate, and having shown how and by whom that question was settled, it is needful now to inquire whether the opinion was a justifiable exposition of the intention of the Senate. And in order to do so, it is only necessary to refer to the proceedings of the Senate on the ratification of the treaty and supplement.

On the 5th day of March, 1836, the President sent the following message:

"*To the Senate of the United States:*

"I submit to the Senate, for their advice and consent as to the ratification of the same, the treaty, and the supplement to it, recently concluded with the Cherokee Indians. The papers referred to in the accompanying communication from the Secretary of War, as necessary to a full view of the whole subject, are all herewith submitted.

"ANDREW JACKSON."

(Senate Journal, first session, twenty-fourth Congress, p. 570.)

And on the 23d day of May following the Senate passed this resolution:

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate do advise and consent to the ratification of the treaty between the United States of America and the Cherokee Indians, concluded at New Echota the 29th of December, 1835, together with the supplementary articles thereto, dated the 1st day of March, 1836, with the following amendments."—(Senate Journal, same session and Congress, p. 575.)

We come now to consider the only question of importance at issue in our case; and, as we have seen, the Senate did not intend that the *allowance* for *spoliations* or the *expenses of removal should be deducted from* the amount of five millions recommended to be offered to the Cherokees "*as the price of their territory*," and the $600,000 not being sufficient for "*these two expenditures*," we would ask, in the spirit of fair and honorable dealing, how could the United States, with justice or propriety, come back to the five millions, and deduct therefrom the excess? The same can be said with regard to subsistence, as the terms used in the resolution of the Senate does not admit of any other construction. Thus the treaty was "*invalidated*" by the addition of the supplement, and the items of spoliation, removal, and subsistence, named in the 15th article as being deductable, were not to be *deducted*, but were abrogated just as much as if an article had been inserted for that purpose—the effect being the same by implication and construction.

We insist, then, that the Secretary of War, Mr. Poinsett, and Congress were right in recommending and passing the act of June 12, 1838, by which $1,047,000 was appropriated "in full for all objects specified in the 3d article of the treaty of 1836 between the United States and the Cherokees, and for the further object of aiding in the subsistence of the Indians for one year after their removal west." The act was only carrying into effect an obligation of the government, and therefore the legislation was strictly legal, and not a gratuity, as has generally been supposed. The facts presented certainly justify such a conclusion. These facts, too, were in the possession of the Secretary of War and Congress at the time the act was passed; and may we not, with perfect propriety, venture the opinion by saying, had these facts been in the possession of the Court whilst they were adjudicating the case, would not their decision have been different? We humbly trust so; and the only excuse we have now to offer for not presenting them previously was the strict reliance placed on the aforesaid act of the obligations of the government to pay the excess, and considering, as we had a right to, that *that* question was thereby fully and finally settled in favor of the Cherokees.

Should the Court consent to hear argument of counsel on the motion to grant a new trial, we think we shall be fully able to prove that the Executive regarded subsistence for one year after removal limited to $33 33, and did not go beyond this sum in any contract entered into for that purpose. The $172,316 47 expended for subsistence one year after removal, "was furnished to the Indians when in great destitution, upon their own urgent application, after the ex-

piration of the one year, upon the understanding that it was to be deducted from the moneys due them under the treaty."—(Senator Sebastian's report, page 10.)

With regard to the expense of the Cherokee committee, named in the 12th article of the treaty of 1835, we would only remark, in contradistinction to the opinion of the court, that if it was a national committee, acting for and in behalf of the Cherokee nation, it never had an existence as such previous to the date of said treaty, or, in other words, it was the creature of the treaty; and in either event the expenditure on their account, if *reimbursable* at all by the Cherokees to the United States, should have been reimbursed out of their national, and not their per capita fund. We are strict constructionists, and adhere to the doctrine that treaties between nations, like compacts between States, are not to be warped to suit the convenience of the hour of either or any party.

The per capita fund was not national, in the strict sense and meaning of that term, but belonged individually to every man, woman, and child composing the Cherokee nation, and the United States had no legal, express, or implied right to touch that fund, except for the purposes contemplated by the treaty. By this assumption of right on the part of the Executive of the United States, the per capita fund was reduced that amount, and individuals have been made to reimburse the United States out of their private purses, when the burden should have been borne by the common treasury of their nation. There was no authority for this, unless it were the law of power; certainly no such right vests in the treaty.

J. K. ROGERS.

WASHINGTON, *January* 1, 1856.

IN THE COURT OF CLAIMS.

JOHNSON K. ROGERS *vs.* THE UNITED STATES.

Brief of U. S. Solicitor on amended petition.

When this claim was before the Court on the original petition, the amount claimed was $92,625 19, which was arrived at mainly by adopting the settlement under the treaty of 1846 with the *old settlers* as the basis of settlement with the claimants who are not *old settlers*, and to whom neither the provisions of the treaty, in respect to old settlers, nor the reasons for those provisions, apply.

But even on that basis, by the 4th article, spoliations, removal and subsistence were to be charged to the treaty fund, and were charged in the account taken, on which the claimant relied.

Now, however, on his amended petition, he claims that the account shall be taken without these items altogether, and that his claim amounts to $171,719 29.

It is true he inserted in his original petition that he might have claimed more, and that the $5,000,000 fund was not chargeable with these items at all; and the Court considered most of the argu-

ments which are now offered on this point, in passing on the original petition, although the claim in that petition was, as I have said, based chiefly on the account rendered, in which the right to charge this fund with these items was assumed.

The principal ground now relied on, not heretofore presented, to maintain this, is, that the Senate, in March, 1835, by resolution, stated, as their opinion, that a sum not exceeding $5,000,000 should be paid to the Cherokee Indians *for all their lands and possessions* east of the Mississippi river. That this was an award between the chiefs and the President, who could not agree about the amount. That it is distinctly stated in the resolve as the price of the land, &c. When the treaty and supplement were subsequently made in December, 1835–'36, the question which had arisen between the Executive and the Indians as to the meaning of the Senate's resolve it was agreed should be referred to the Senate; and if it should appear that the $5,000,000 was not intended to include these items, then it was further agreed that such further provision should be made by the Senate as might appear just to the Senate; an article was submitted with a blank, for the same to be filled up with such sum as the Senate should deem a proper provision in that case.

This was the 3d article of the supplement, in which a fund of $600,000 is provided to cover these and "*all claims of every nature* and description not herein otherwise provided for."

This is called an appropriation in the argument of the claimant, and the common case of too small an appropriation. It is not so. It is a treaty provision, and is a part of that award, and within the terms of that submission of which so much is said in the claimant's argument. The Senate was not only the arbiter to decide whether the disputed items were embraced in their offer, but the arbiter also to determine what further provision should be made in the event that these items were not within the fund.

This may seem an extraordinary provision, because, as it is argued by the claimant, it would seem, if the United States were bound to pay any portion of these items, it would be proper to pay all; and there would seem to be no propriety in stipulating at all, further than to fix the liability—much less stipulating for a specific sum in advance of the ascertainment of the actual amount. But whether common or not, and whether the mode which would seem most proper and reasonable to us or not, is not material. It is certain that this was the course which it was deemed *just* by the Senate to pursue; and it is not competent for the Court to review its action, for, besides that, it is the action of the Senate on a subject within its jurisdiction, as the treaty-making power. It was the decision of the body to which the Cherokees referred the question of fact as to the extent of its offer, and the question of what was "just" to make good that offer.

The claimant thinks it not just that the fund should be charged with any portion of these items, and the injustice of it is admitted because the Senate agreed to add to the fund. It would be easy to justify the Senate's action, if it was necessary, and to show that the Senate, as well as the Executive, have acted, and have continued to act, with extreme liberality, and that the clamor which has been made about

imposition on the Indians is merely in aid of attempts to impose on the government.

We are here, however, now to construe the treaty and not to discuss its justice, and it would be improper to go into such considerations.

The treaties of 1828 and 1833, and the treaties with other tribes, providing for the supply "of a good rifle, a blanket and kettle, and five pounds of tobacco, to every Indian, on enrolling himself for emigration," and stipulating also to pay "the cost of emigration of all such," and "support by the way, and for twelve months after the arrival at the agency," have no application to the case.

That treaty and supplement was intended to induce individual emigration, and those who received the benefits of it were to be enrolled. Each particular case was the subject of arrangement. The treaty of 1835–'36 provided for the removal of the tribe, the purchase of their whole property for a given sum, and regulated the distribution of the purchase-money *per capita* after the payment of the expenses of removal, subsistence, &c,

There is no such inconsistency or repugnancy between the 8th and 15th articles of the treaty as to authorize the assumptions that either was not in force. The Court has already passed on the supposed conflict in these articles, and decided that there is none, and that they are consistent. In addition to what is said in the opinion on this point, I would suggest that the schedules accompanying the treaty, showing the estimates upon which the sum to be paid was fixed, are conclusive that these articles should stand together. These show that it was not intended that there should be much, if any, surplus money for distribution. General Jackson and the Senate, and the able men who have had to deal with those subjects, knew full well that such money was worse than thrown away. When they had provided a fertile tract of land in the west, payment for the improvements of individual's ferries and other individual property in the tribe, and to enable them to erect improvements in their new homes, and remove them to their new homes, subsisted them for twelve months, and stipulated for annuities, shops, &c., anything more was not only waste, but was merely given to the white men, and half-breeds, and headmen, for their own purposes.

It was because the $5,000,000 recommended by the Senate did not enable Ross to fill his private purse that he flew from his solemn agreement with General Jackson, in March, 1835, and not, as is said in the argument here, because General Jackson did not furnish him the minutes of the Senate or abide by the award; for when that pretext was made it was offered to him to submit the question again to the Senate, on the treaty, and he flew from it, and preferred to subject his people to *all* the distress they suffered, rather than forego the opportunity of enriching himself.

It is apparent, on the face of his proceedings, and even in his offer, that it was the money he stuck out for, and not the honor of his fathers.

General Jackson dealt with things and not with forms. He knew, as everybody knows, that the Indians were a dependent people, to be disposed of and dealt with kindly, as far as practicable, but their re-

moval was a necessity. Ross and his confederates knew this as well as he did, and wished to take advantage of it for their private ends, and the General would not permit them. Ross struggled hard, found supporters in Congress, and managed to get some money out of it; but, in the end, although he made a great deal of trouble, and committed many shocking crimes, had to submit.

He carried on for years a pretty good business, and he and others who have taken on themselves the business of taking care of the poor Indians, have, like the intendent in Gill Blas, done a good business for themselves in taking care of the affairs of the poor.

This trade Congress intended by the act of 27th of February, 1851, quoted in my former brief in this case, to put an end to, and I hope that the Court will reconsider this construction of that act.

It was not intended, therefore, by the treaty, to do more than to give the Indians a new home, remove them to it, enable them to put up similar improvements to those left behind, support them for a year, and start them under new auspices in a course of civilization. The eighth article guarantied this from the United States; and although by the fifteenth article the fund was charged with it in the first instance, if the fund had proved insufficient, the government would have been bound to pay the difference. It was thought to be ample, and it was no doubt deemed best to make such a fund, and hold out the temptation of a surplus to give the chiefs and the tribe generally a pecuniary interest and the hope of a surplus, in order to induce economy.

The Court has already declared that the law of 1838, and the decision of the Senate in 1850, are not constructions of the treaty and supplement.

The Court expresses the opinion that the proviso of the act requiring a receipt in full, on payment of the money thus appropriated, does not apply to the claimants, because they are not now a part of the Cherokee nation.

I reply, that none of the money thus appropriated was to be paid to the *Cherokee nation* in its corporate capacity. That is expressly provided against in the appropriation itself, and was previously provided against in the treaties of 1835 and 1846. The money was to be paid to the individuals *per capita*. To make any payment, therefore, it is necessary to construe the language to mean the Cherokee people. But the Court say that it must be taken to apply only to individuals then composing that section, and, as these did not then form a part of it, they are not concluded. This construction would also have concluded them from receiving the money. This was not intended. It was an appropriation expressly for paying off all demands whatever, under any treaty heretofore made with the Cherokees. These persons, though no longer members of the Cherokee nation, were Cherokees in one sense, and were entitled, by the twelfth article, to the *per capita* appropriated in the act of 1851. The receipt to be given was, therefore, it seems to me, equally conclusive against all Cherokees claiming under any treaty, whether they were then citizens of the United States or continued members of the tribe.

M. BLAIR, *Solicitor.*

J. K. ROGERS *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

The petitioner has been permitted to file an amended and substituted petition in the place of his original petition, and we have been called upon to reconsider our former judgment. The case has again been argued with great ability on both sides, and we have carefully re-examined it.

In our former opinion we held that the sums expended for removal, subsistence, and spoliations were properly chargeable to the treaty fund; that the expense of removal and subsistence was limited—of the one to twenty, and of the other to thirty-three dollars and thirty-three cents—only in regard to such of the Cherokees as, under the 8th article of the treaty of 1835–'36, were allowed to remove and subsist themselves; and that the expense of the committee appointed under the 12th article of the treaty was properly chargeable against the Cherokees. Our conclusion was, that the facts set forth in the original petition do not furnish any ground for relief.

Much stress is laid in the amended petition on the 8th article of the treaty of 1828, which the petitioner insists was in full force at the time the treaty of 1835–'36 was made. That was a treaty between the Cherokee nation of Indians *west* of the Mississippi and the United States. The Cherokees east of the Mississippi were not parties to it, or in any respect bound by it. The 8th article of that treaty was a mere proposition to the latter, and to entitle them to the benefit of it they must not only show an acceptance of it on their part, but an acceptance in the very terms in which it was offered. But it is not, and cannot be, pretended that they ever thus accepted it. It seems to us, therefore, to be wholly unnecessary for us to consider the character of the obligation which it would have imposed upon the United States, if it had been thus accepted. The treaty of 1835–'36, so far from being an acceptance of that proposition, makes no reference whatever to it. Whether, at the time of the making of the latter treaty, it was at all in the minds of the high contracting parties is, and must forever be, a matter of mere conjecture. In reference to the subjects embraced by the proposition, the treaty of 1835–'36 has its own stipulations, which, upon the making of the treaty, became obligatory upon the parties to it. The rights and obligations of the parties in reference to those subjects grow out of those stipulations, and not out of the unaccepted proposition. The former is a complete contract, whilst the latter was a mere offer, which, not having been assented to by the eastern Cherokees, is now a mere nullity.

The petitioner insists that the question submitted to the Senate by the treaty was, whether the five millions of dollars were not the price of the lands of the Cherokees. Upon this point we can look only to the treaty. Its language is plain and explicit. The 1st article recites the resolution of the Senate, and submits the question whether the Senate in that resolution included spoliations. Afterwards the parties, by the 2d and 3d supplementary articles, not only enlarged the submission so as to include removal as well as spoliations, but actually

framed the award, and agreed that it should become a part of the treaty, if the Senate should approve of it. The language of these articles is too plain to leave room for construction. They clearly do not sustain the position of the petitioner.

Looking at the award of the Senate as we find it in the 3d supplementary article, we have not been able to discover any ground whatever for the proposition that the treaty was framed with a double aspect, so that if the Senate should decide in favor of the Cherokees, then the 8th article should stand unqualified by the 15th article; but if the decision of the Senate should be unfavorable to them, then the 15th article should stand and qualify the 8th article. If such was the intention of the parties, they ought so to have expressed themselves. The treaty as it now stands, whether we consider it in itself, or as connected with the circumstances under which it was made, is susceptible of no such construction. The 8th and 15th articles are entirely consistent with each other, and admit, it seems to us, of no other construction than that which we put upon them in our former opinion.

Entertaining these views, we cannot assent to the proposition that "the $600,000 was not given as a finality, but it was the concession of a right, and to *meet* expenditures for which the United States were bound." The stipulation for the payment of six hundred thousand dollars may be regarded as the concession or recognition of a right to the award of the Senate upon the subjects submitted to that body, but of no other right; and when ratified by the Senate, it became a part of the treaty, and entitled the Cherokees to the payment of that sum of money, to be applied to the purposes mentioned in the 3d supplementary article. But this was its whole effect. Nor can we say that "it was a fraud on the Cherokees to state the purposes for which this $600,000 was given, as they are stated in the 3d article of the supplement—that is, for *all* claims of every nature, &c., reservations, pre-emptions, &c." We do not suppose that Congress has conferred on this Court, even if it have the power to do so, jurisdiction to inquire into a fraud alleged to have been committed by the treaty-making department under the Constitution of the United States. We must take the treaty in all its parts as we find it. If a fraud has been committed in the making of the treaty, this Court has no power to afford relief.

The petitioner treats the stipulation for the payment of $600,000 as an appropriation to be applied *pro tanto* in discharge of an existing obligation on the part of the United States. But this is not its character. It is but a treaty stipulation, and not an appropriation. By it the United States became bound to pay that sum of money for the purposes therein mentioned, but it imposed or recognized no other obligation. If more was intended, its language ought to have been different. We cannot make a treaty; we are called upon merely to say what is the meaning of that which was made; and we have already seen that there was no such previously existing obligation as that insisted upon by the petitioner. Thence we were fully warranted in saying, in our former opinion, that the fact that the United States

limited the sum conclusively shows that they intended thereby to limit the extent of their obligation.

In regard to the construction of the statutes which have been enacted since the date of the treaty of 1835–'36, and the effect of the treaty of 1846, we have found no reason to change the views which we have heretofore expressed. We think, too, that there is no error in our former opinion in regard to the expense of the committee appointed under the 12th article of the treaty of 1835–'36.

We are of the opinion that the facts set forth in the amended petition of the claimant do not furnish any ground for relief, and we do not, therefore, authorize the taking of testimony in this case.